APPENDIX

APPENDIX A

Nos. 74-1110-12, 74-1114, 74-1113, 74-1115-16

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JEAN WHITEHOUSE RAMEY,
Plaintiff-Appellee,
v.
THE CINCINNATI ENQUIRER, INC., and AMERICAN FINANCIAL CORP.,
Defendants-Appellants.

ANGIOLINA MORELLI,
Plaintiff-Appellee,
v.
THE CINCINNATI ENQUIRER, INC., and AMERICAN FINANCIAL CORP.,
Defendants-Appellants,

ALBERT HARRIS,
Plaintiff-Appellee,
v.
THE CINCINNATI ENQUIRER, INC., and AMERICAN FINANCIAL CORP.,
Defendants-Appellants.

JEAN W. RAMEY, ANGIOLINA MORELLI and ALBERT HARRIS,
Plaintiffs-Appellees,
v.
THE E. W. SCRIPPS COMPANY, THE SCRIPPS-HOWARD INVESTMENT CO., and JACK R. HOWARD,
Defendants-Appellants.

ORDER

CECIL F. SCHOEN, a/k/a CECILE F. SCHOEN,

Plaintiff-Appellant and Cross-Appellee,

v.

THE CINCINNATI ENQUIRER, INC., THE E. W. SCRIPPS CO., THE SCRIPPS-HOWARD INVESTMENT CO., JACK R. HOWARD and AMERICAN FINANCIAL CORP., ET AL.,

Defendants-Appellees and Cross-Appellants.

CECIL F. SCHOEN, a/k/a CECILE F. SCHOEN,

Plaintiff-Appellant and Cross-Appellee,

v.

THE CINCINNATI ENQUIRER, INC., THE E. W. SCRIPPS CO., THE SCRIPPS-HOWARD INVESTMENT CO., JACK R. HOWARD, and AMERICAN FINANCIAL CORP., ET AL.,

Defendants-Appellees and Cross-Appellants.

CECIL F. SCHOEN, a/k/a CECILE F. SCHOEN,

Plaintiff-Appellant and Cross-Appellee,

v.

THE CINCINNATI ENQUIRER, INC., THE E. W. SCRIPPS CO., THE SCRIPPS-HOWARD INVESTMENT CO., JACK R. HOWARD and AMERICAN FINANCIAL CORP., ET AL.,

Defendants-Appellees and Cross-Appellants.

Before PHILLIPS, Chief Judge, EDWARDS and MCCREE, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied. We make no comments as to any rights that The Cincinnati Enquirer may or may not have to file a motion in the District Court under Fed. R. Civ. P. 60(b).

Entered by order of the court.

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CLERK

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NO. 74–1110

JEAN WHITEHOUSE RAMEY, *Plaintiff-Appellee,*

–VS–

THE CINCINNATI ENQUIRER, INC. and AMERICAN FINANCIAL CORPORATION, *Defendants-Appellants.*

NO. 74–1111

ANGIOLINA MORELLI, *Plaintiff-Appellee,*

–VS–

THE CINCINNATI ENQUIRER, INC. and AMERICAN FINANCIAL CORPORATION, *Defendants-Appellants.*

NO. 74–1112

ALBERT HARRIS, *Plaintiff-Appellee,*

–VS–

THE CINCINNATI ENQUIRER, INC. and AMERICAN FINANCIAL CORPORATION, *Defendants-Appellants.*

NO. 74–1114

JEAN W. RAMEY, ANGIOLINA MORELLI and ALBERT HARRIS, *Plaintiffs-Appellees,*

–VS–

THE E. W. SCRIPPS COMPANY, THE SCRIPPS-HOWARD INVESTMENT COMPANY, and JACK R. HOWARD, *Defendants-Appellants.*

NO. 74-1113

CECIL F. SCHOEN, aka CECILE F. SCHOEN,	*Plaintiff-Appellant and Cross-Appellee,*
–VS–	
THE CINCINNATI ENQUIRER, INC., THE E. W. SCRIPPS COMPANY, THE SCRIPPS-HOWARD INVESTMENT COMPANY, JACK R. HOWARD, and AMERICAN FINANCIAL CORP., ET AL.,	*Defendants-Appellees and Cross-Appellants.*

NO. 74-115

CECIL F. SCHOEN, aka CECILE F. SCHOEN,	*Plaintiff-Appellant and Cross-Appellee,*
–VS–	
THE CINCINNATI ENQUIRER, INC., THE E. W. SCRIPPS COMPANY, THE SCRIPPS-HOWARD INVESTMENT COMPANY, JACK R. HOWARD, and AMERICAN FINANCIAL CORP., ET AL.,	*Defendants-Appellees and Cross-Appellants.*

NO. 74-116

CECIL F. SCHOEN, aka CECILE F. SCHOEN,	*Plaintiff-Appellant and Cross-Appellee,*
–VS–	
THE CINCINNATI ENQUIRER, INC., THE E. W. SCRIPPS COMPANY, THE SCRIPPS-HOWARD INVESTMENT COMPANY, JACK R. HOWARD, and AMERICAN FINANCIAL CORP., ET AL.,	*Defendants-Appellees and Cross-Appellants.*

Appeals from United States District Court for the Southern District of Ohio, Western Division

PETITION FOR REHEARING

The Cincinnati Enquirer, Inc. (the "Enquirer") hereby petitions the Court for Rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure, for the purpose of modifying and clarifying the Court's decision of December 26, 1974, in the following respects:

(1) To modify its Opinion so that upon remand of this case to the District Court it is required to render judgment against the Enquirer in the amount of $313,449.59 with interest at the rate of 6% per annum from October 10, 1973; and

(2) In the alternative, to grant the District Court the authority, upon remand, to entertain a motion under Rule 60(b) of the Federal Rules of Civil Procedure to reduce the award of attorneys' fees to Plaintiffs' counsel.

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ARGUMENT

Introduction

In its judgment of October 10, 1973, the District Court awarded a total of $865,000 in attorneys' fees (including $115,000 in prejudgment interest) to plaintiffs' counsel. Of that total award, the District Court ordered that $326,290.90 (37.7%) be paid by The E. W. Scripps Company, The Scripps-Howard Investment Company and Jack R. Howard (the "Scripps Group"), $393,333.60 (45.5%) be paid by the Enquirer, and $145,375.50 (16.8%) be paid by AFC on behalf of the Enquirer's minority shareholders.

In its decision of December 26, 1974, the Court found that the District Court did not abuse its discretion by awarding total attorneys' fees of $750,000 to Plaintiffs' counsel. However, the Court also vacated that portion of the District Court's judgment requiring part of those fees to be paid by parties other than the Enquirer.

This Court's decision reversed the rationale employed by the District Court to award attorneys' fees against the Enquirer, the Scripps Group, and the minority stockholders. Based upon this Court's decision, the Enquirer's liability for attorneys' fees, as a matter of law, cannot exceed the amount previously determined by the District Court, i.e., $393,333.60. From this figure must be deducted the sum of $115,000, which this Court ruled was unlawfully assessed against the Enquirer as prejudgment interest. Therefore, the total liability of the Enquirer is, according to this Court's decision, $278,333.60 plus $35,115.96 in expenses, or a total of $313,449.56.

In the alternative, upon remand, the Enquirer wishes to submit a motion to the District Court, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, to reduce the total attorneys' fees awarded to Plaintiffs' counsel in light of the Court's decision of December 26, 1974, that only the Enquirer was liable for attorneys' fees in this derivative action. Therefore, this Court is requested to clarify its decision in accordance with the request made herein so that upon remand the Enquirer may make the above-referred to motion.

IN A STOCKHOLDER'S DERIVATIVE SUIT, THE DEFENDANT CORPORATION IS ONLY LIABLE FOR ATTORNEYS' FEES BASED UPON THE BENEFITS CONFERRED BY THE LITIGATION ON THE CORPORATION, ITSELF.

I. The District Court's total award of attorneys' fees was based upon the benefits conferred by the litigation upon three groups, i.e., the Enquirer, the Scripps Group, and the minority shareholders.

The history of the proceedings at the District Court level makes evident that the question of the resolution of who should pay the attorneys' fees (allocation of fees) was a prerequisite to the determination of the total amount of fees to be awarded.

On May 14, 1973, at the beginning of the Allocation Hearing, counsel representing the Plaintiffs' counsel on their Application for Attorneys' Fees made a motion with the District Court that the total fee award be determined prior to the Allocation Hearing. The record of this proceeding (Allocation Hearing, Tr. pp. 15–17) indicates that the Court could not and would not assess attorneys' fees without first considering the allocation question, and the Court concluded the overruling of Plaintiffs' motion with the following:

> THE COURT: I realize that this is very important to your clients, and I am keenly aware of the need for an order which will bring this to a conclusion. But you are keeping us from our work today, because this (allocation) is something we have to get behind us before we can make that order (attorneys' fees). (Emphasis supplied; our parenthesis.)

Thereafter, on September 13, 1973, the District Court rendered its Opinion, at which time it contemporaneously awarded the sum total of attorneys' fees and made the allocation thereof. It is submitted that the District Court's Opinion indicates that the total award of $900,115.96 ($865,000 in fees and $35,115.96

in expenses) was determined in large part on the basis of who had been benefited by the litigation. Properly, the District Court referred to *Denney v. Phillips & Buttorf Corp.*, 301 F. 2d 269, Cert. denied, 379 U.S. 831 (1964), in determining the amount of the fee (Op. p. 7). Equally, this Court in rendering its decision in this case held that one of the considerations in fixing attorneys' fees is "the value of the benefit rendered to the corporation or its stockholders". (*Ramey, et al. v. Cincinnati Enquirer, et al.*, Op. p. 14.)

In awarding the attorneys' fees in this case, the District Court has opined that the shareholders of the Enquirer, Scripps-Howard and the minority, received benefits and that, therefore, this was to be taken into consideration in determining the amount of fees. The Court's Order of October 10, 1973, on the attorneys' fees included the following finding:

> 4. That the defendant, The Cincinnati Enquirer, Inc., and all of its shareholders, including the Scripps Group, have received substantial benefits, both tangible and intangible, as a result of this litigation, and the payment of the award of fees and costs should be allocated among those so benefited. (Order, P. 514)

Therefore, the District Court in determining the amount of fees necessarily gave consideration to what benefits were received by the various parties that the Plaintiffs' wished to receive attorneys' fees from, i.e., the Enquirer, the Scripps Group, and the minority shareholders.

In determining the Enquirer's liability for attorneys' fees and expenses, the District Court considered its relative size and ability to pay for the fees. In both its Opinion of September 13, 1973, and Order of October 10, 1973, the District Court referred to these factors. For example, in its Opinion the Court stated:

> For one thing, we have taken into account that the annual income of The Enquirer was only $2,049,161 for 1969 (after taxes) and $2,319,638 for fiscal 1970. The Enquirer's cash resources are roughly those of the down payment or cash payment mentioned herein. We are not saying this is controlling, but it seems appropriate to take into account the

fact that The Enquirer, while not a small corporation, was not a giant. (P. 501).

Besides the earning capacity of the Enquirer of approximately $2,000,000 per year, the Court was also aware that the Enquirer balance sheet of September 30, 1969, indicated that its total shareholders equity was only $12,136,213.

Significantly, of the $900,115.96 total fees and expenses awarded in this case, $428,449.56 ($393.333.60 fees and $35,115.96 all expenses) was awarded against the Enquirer, which was less than 50% of the total awarded. Therefore, if the Enquirer is alone liable for the entire amount of attorneys' fees, it is apparent that the Enquirer's total liability for fees is more than double what the District Court had ruled, in its discretion, was reasonable *as to that Defendant.*

II. It is improper to assess the Enquirer for attorneys' fees based upon benefits conferred upon its former shareholders, which benefits were incidental and unique to those shareholders and were not even remotely conferred upon the corporation, itself.

The foregoing analysis indicates that the District Court, while properly applying the prerequisites to the award of attorneys' fees in accordance with *Denney v. Phillips & Buttorf Corp.*, supra., nevertheless erroneously included too many benefits in awarding the attorneys' fees by considering the incidental and unique benefits conferred upon the stockholders of the corporation, viz., the Scripps Group and the minority shareholders. For example, the Court in its Opinion stated:

> The Court concludes this is a proper case for allocation, but hastens to point out this is not because of any bad faith or the participation of the Scripps Group in the preparation of the proxy statement and agreements. They did indeed participate, and their suggestions—eventually, at least—were welcomed by the Enquirer. There was no bad faith on their part, and the Court so found. *Nevertheless, the Scripps*

Group occupied a fiduciary position. They come out real well and the time it took for this litigation worked to their great advantage in that a better offer came along—one for $5 more per share and which took them off the hook as far as exposure to claims that they were civilly liable if they accepted any offer which did not run to the minority shareholders. Much more could be said, but that should suffice to show why the Court concludes this is a proper case for allocation. We therefore conclude that the Scripps Group should pay (toward fees and expenses) at the rate of $.65 a share, for a total of $326,232.40 for their 501,896 shares. (Emphasis supplied.) (P. 511)

Reversing the District Court, this Court held that the former stockholders of the Enquirer could not be liable for attorneys' fees. We submit that the former stockholders' liability for attorneys' fees cannot be imposed upon the Enquirer because the District Court had determined these fees on the basis of benefits received only by the Scripps Group and the minority stockholders.

This Court has ruled that because this action was a stockholder's derivative suit, counsel fees cannot be awarded individually against stockholders who may have profited from the derivative litigation, but must be assessed only against the corporation. *Ramey, et al., supra.,* p. 20. In so ruling, the Court followed *Jones v. Uris Sales Corp.* 373 F. 2d 644, 648 (2d Cir. 1967).

However, it is submitted that in order to be in accord with the holding herein and with the *Jones* case, the fees for which a corporation could be responsible must be those for which it received a benefit and would otherwise have had to pay for itself. We believe the language quoted from *Jones* in this Court's Opinion is dispositive of the Enquirer's position as follows:

> [T]he reason for the award of such fees in a stockholder's derivative suit . . . [is] that the plaintiffs' efforts have conferred on the corporation a benefit for which the corporation would otherwise have had to pay itself.

In short, it is the Enquirer's position that it is not equitable or

legally proper to hold it liable for fees originally assessed against the Scripps Group and the minority stockholders for the following reasons:

(1) The District Court calculated the fees on the basis of benefits received by the three parties Plaintiffs' attorneys sought to recover them from, i.e., the Enquirer, the Scripps Group, and the minority stockholders.

(2) This Court has determined that the Scripps Group and the minority stockholders cannot be charged for any part of the fees, but has assessed the Enquirer for this portion of them.

(3) This is impermissible in view of this Court's holding and the *Jones* case requiring that the corporation pay for benefits which it received from the litigation and which it would have had to otherwise pay for itself.

(4) Since the Enquirer received none of the benefits which the District Court accorded to the Scripps Group and the minority stockholders, the Enquirer cannot be liable for fees calculated on the basis of these benefits.

Conclusion

The Enquirer requests this Court to reconsider its Opinion rendering the entire attorneys' fees against it in light of the considerations stated herein, and to rule as a matter of law that it is liable for only that portion of the attorney fee award previously attributed to it consistent with this Court's other findings. Alternatively, the Enquirer requests that the Court clarify its decision so that upon remand to the District Court it may move for a modification of the attorney fee award pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing has been sent by regular United States mail to counsel for all parties this 9th day of January, 1975.

Louis F. Gilligan

APPENDIX C

Nos. 74-1110-16

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JEAN WHITEHOUSE RAMEY,
Plaintiff-Appellee,

v.

THE CINCINNATI ENQUIRER, INC., and AMERICAN FINANCIAL CORPORATION,
Defendants-Appellants.

ANGIOLINA MORELLI,
Plaintiff-Appellee,

v.

THE CINCINNATI ENQUIRER, INC., and AMERICAN FINANCIAL CORPORATION,
Defendants-Appellants.

ALBERT HARRIS,
Plaintiff-Appellee,

v.

THE CINCINNATI ENQUIRER, INC., and AMERICAN FINANCIAL CORPORATION,
Defendants-Appellants.

JEAN W. RAMEY, ANGIOLINA MORELLI and ALBERT HARRIS,
Plaintiffs-Appellees,

v.

THE E. W. SCRIPPS COMPANY, THE SCRIPPS-HOWARD INVESTMENT COMPANY and JACK R. HOWARD,
Defendants-Appellants.

APPEALS from the United States District Court for the Southern District of Ohio, Western Division.

CECIL F. SCHOEN, a.k.a. CECILE F. SCHOEN,

Plaintiff-Appellant and Cross-Appellee,

v.

THE CINCINNATI ENQUIRER, INC., THE E. W. SCRIPPS COMPANY, THE SCRIPPS-HOWARD INVESTMENT COMPANY, JACK R. HOWARD, and AMERICAN FINANCIAL CORP., ET AL.,

Defendants-Appellees and Cross-Appellants.

CECIL F. SCHOEN, a.k.a. CECILE F. SCHOEN,

Plaintiff-Appellant and Cross-Appellee,

v.

THE CINCINNATI ENQUIRER, INC., THE E. W. SCRIPPS COMPANY, THE SCRIPPS-HOWARD INVESTMENT COMPANY, JACK R. HOWARD, and AMERICAN FINANCIAL CORP., ET AL.,

Defendants-Appellees and Cross-Appellants.

CECIL F. SCHOEN, a.k.a. CECILE F. SCHOEN,

Plaintiff-Appellant and Cross-Appellee,

v.

THE CINCINNATI ENQUIRER, INC., THE E. W. SCRIPPS COMPANY, THE SCRIPPS-HOWARD INVESTMENT COMPANY, JACK R. HOWARD, and AMERICAN FINANCIAL CORP., ET AL.,

Defendants-Appellees and Cross-Appellants.

Decided and Filed December 26, 1974.

Nos. 74-1110-16 *Ramey, et al.* v. *Cinti. Enquirer, et al.*

Before PHILLIPS, Chief Judge, EDWARDS and MCCREE, Circuit Judges.

PHILLIPS, Chief Judge. These are appeals from an order granting attorneys' fees in four stockholder derivative suits that were dismissed on grounds of mootness after trial but before adjudication. The District Judge's order awarded a total of $865,000 in attorneys' fees and $35,115.96 in expenses to be paid to plaintiffs' attorneys in four cases by defendants Enquirer[1] and Scripps,[2] with a contribution of $145,375.00 on the part of the minority shareholders to be paid by American Financial Corporation.[3]

This litigation had its genesis in an antitrust action filed against the E. W. Scripps Company by the Department of Justice in 1964. The Scripps-Howard interests, while owning Cincinnati's only evening newspaper, *The Cincinnati Post and Times Star,* also acquired the majority interest in the stock of *The Cincinnati Enquirer,* Cincinnati's only morning newspaper. The antitrust action was tried before the same District Judge who rendered the judgment involved in the present appeal and was terminated by a consent decree requiring that Scripps divest itself within 18 months of its controlling interest in the Enquirer.

Early in 1970 the management of the Enquirer, ultimately supported by a majority of the minority shareholders, put together a bid to Scripps-Howard to purchase Scripps-Howard's 60 per cent share of the Enquirer stock. A stock acquisition agreement was signed which provided that the Enquirer would purchase all of the Enquirer stock owned by Scripps-Howard at $35 per share, 11½ million dollars to be paid in cash and

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[1] Enquirer in this opinion will refer to the Cincinnati Enquirer, Inc., the owner of the newspaper, *The Cincinnati Enquirer.*

[2] Scripps or Scripps-Howard will be used in this opinion to refer to the Scripps group of defendants, consisting of the E. W. Scripps Co., Scripps-Howard Investment Co. and Jack Howard.

[3] Subsequently American Financial or AFC.

the balance to be paid by the issuance of 60,000 shares of preferred stock.

The details of the plan and its proposed financing by the Prudential Life Insurance Co. of America were as follows:

1) The Enquirer would purchase directly from the Scripps group 330,558 Enquirer shares at $35 a share, totaling $11,569,530.

2) Of this sum the Enquirer was to borrow $10,500,000 from the Prudential Life Insurance Co., to be repaid at 12 per cent interest over 16 years.

3) The balance of 171,428 shares owned by the Scripps group would be purchased by the Enquirer by issuance and exchange of 60,000 newly authorized shares of convertible preferred stock that Scripps then agreed to sell (and Prudential by separate contract agreed to buy) for $6,000,000 in cash. The Enquirer would be obligated to pay a yearly dividend of $7.65 on each share of preferred stock and to redeem a minimum of 3,000 shares a year at $110 per share.

4) Under this arrangement the Prudential Life Insurance Co. would have invested $16,500,000, on which the Enquirer would be required to pay a return of 12 per cent on the loan and about ten per cent on the preferred stock. On default of the Enquirer's obligation on either the preferred stock or the debt, Prudential could acquire the entire assets of the Enquirer.

5) The Enquirer was able to contribute only one million dollars from its working capital to accomplish this purchase.

6) The redemption of preferred stock, plus the interest on the loan, would equal about one and one-half million dollars a year. Previously the Enquirer had been netting about two million dollars each year after taxes.

7) No provision was made for any offer to the minority stockholders of the Enquirer. At a stockholders' meeting on October 23, 1970, the stock acquisition plan described above

was approved by a vote of 222,930 to 75,307, with the Scripps' 60 per cent of the shares not voting.

In October 1970 three stockholders' derivative suits (Ramey, Morelli and Harris) were filed to set aside this stock purchase plan, alleging, among other things, that the proxy statement contained untrue and misleading statements of material fact and that the plan violated various provisions of both federal and Ohio law.[4] Two of these suits (Ramey and Morelli) were filed before the stockholders' meeting and resulted in the order of the District Court on October 22 enjoining the execution of the purchase agreement until further order. The derivative action of Harris was filed on October 26. Later in November an action was filed on behalf of a stockholder named Schoen. This suit also attacked the acquisition agreement, essentially contending that the proposed transaction was fraudulent.

The cases were tried for about two months, concluding January 18, 1971. Ten days after the trial and before any opinion had been announced, the litigation was mooted when Scripps, making use of an escape clause in the acquisition agreement, terminated its proposed deal with the Enquirer group. This termination by Scripps was prompted by a bid of $35 a share (the same figure as the Enquirer bid, but extended to all minority shareholders) from a California-based trading stamp company called Blue Chip Stamps. Thereafter, and before the court had acted on a petition by the United States and the Enquirer to require the Scripps group to extend the Enquirer agreement, the American Financial Corporation offered Scripps-Howard $40 per share for its 60 per cent interest in the Enquirer's stock and offered the same amount per share to all of the minority shareholders. This offer was accepted by Scripps-Howard. AFC proceeded to acquire

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[4] *E.g.*, §§ 10(b) and 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78n(a) (1970), and the rules thereunder, 17 C.F.R. §§ 240.10b-5, 240.14a-9 (1974); OHIO REV. CODE ANN. § 1701.35 (Page's Supp. 1973).

the entire Scripps-Howard interest and ultimately all of the minority shares.

The District Judge subsequently issued an informal opinion disclosing the findings of fact that he would have made and the conclusions of law that he would have entered had the case not been mooted. He then heard and decided the requests by the different attorneys for attorneys' fees.

In his fee opinion, the District Judge described the Enquirer-Scripps deal, as originally proposed, in the following language:

> "However, it is to be noted that the transaction would have changed the Enquirer stock from 'safe' to 'risky' or 'high leverage.' And the Enquirer-Scripps deal was accurately described as 'thin.' As stated by one of the Enquirer directors, it was no deal for 'widows or orphans.'"

In the same opinion he also said in part:

> "The purchase by a corporation of its own shares has a potential for abuse, and restrictive legislation has therefore grown up to meet the need to prevent such abuse. Hence, any time a corporation attempts to purchase its own shares, especially on a shoestring, the transaction has to be cast in a form which meets the legal requirements and a number of extremely difficult questions in the area of corporate law and finance arise. One restriction on purchase by a corporation of its own shares is the Impairment of Capital Statute, Ohio Revised Code 1701.35, which provides that after such purchase the 'debts' of the corporation must not exceed its assets plus 'stated capital.' That explains why only so much money could be borrowed from Prudential and the balance had to be raised by sale of preferred stock which could be determined to be 'equity' and not 'debt.' In this case the preferred stock had warrants, voting powers, conversion privileges, redemption and other rights, and a difficult and serious question was presented as to whether, though cast in the form of 'equity,' it was not in law

and in fact 'debt.' If the shares were 'debt,' the assets of the Enquirer after the purchase of the Scripps shares would not have exceeded debts plus stated capital as required by ORC 1701.35, and the deal would have been illegal.

"That was just one of many complex questions. Another involved the corporate power and many others arose in connection with the proxy statement and the claims that statements therein were materially misleading. One of these was it was not accurate in its portrayal of the effect of the deal on the Enquirer's ability to pay dividends and its dividend policy. Another was that in describing the effect of the plan on the book value of the Enquirer stock (proxy statement, p. 6) instead of a drop from plus $15.42 per share to 'none,' the proxy statement should have shown a drop from $15.42 to minus $13.07.

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"[I]n the Enquirer case, by deciding to change stated capital as proposed from $5 per share to $1 per share, the shareholders were saying in effect they chose to embark on the proposed corporate venture and in order to do so to completely change the capital structure of the Enquirer, eliminate the shareholders' equity, change its stock from 'safe' to 'risky,' and agreed to pay for the outstanding shares out of future earnings.

• • •

"We also considered the commentary and the chapter on the Model Corporation Act — the commentary to §5, 'Right of corporation to acquire and dispose of its own shares.' This points out that most statutes, like the Model Act, provide in substance that a corporation's own shares shall be purchased only out of surplus except in special situations specified in the statute. And of the many cases, one which we found noteworthy is *Mountain States Steel Foundries, Inc.* v. *C.I.R.*, 284 F. 2d 737 (5 Cir., 1960), where an impairment statute similar to Ohio's was under the glass.

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"This should suffice to underline that a proposed acquisition of the Enquirer of its own shares, cast in the form it was, was not only 'thin' financially, but legally as well.

• • •

"As to economic benefit, while there is dispute, this much can be said. If the Enquirer had purchased the Scripps shares, that is, if the plan had not been restrained, the Enquirer would have paid out $17.5 million in principal and would have lost the income on investments owned by it which had to be liquidated to apply on the purchase price of the stock in the sum of $1,026,748. In addition, the Enquirer would have obligated itself to interest payment on the loan of $15,975,000, and dividend payments on preferred stock of $4,590,000, and payment of premiums on required preferred stock redemption of $600,000, which payments would have totaled $22,191,748, in addition to the $17.5 million in principal previously stated. Also, as to economic benefit, it can be said that the *corporation*, as Mr. Goldman contended, received nothing for the $17.5 million it paid for its own stock, or would have paid. If the deal had gone through, the book value of the stock would have gone from plus to minus, and it is probable the market value would have gone way down, at least temporarily. An incidental benefit conferred on the shareholders was that in the time it took to litigate Scripps kept its option open, and along came the Blue Chip offer to all shareholders for $35 a share, and the AFC offer to all shareholders of $40 a share, the difference between $40 and $35 being about $2.5 million or more to Scripps alone.

"Nevertheless, in fixing the fee we have not gone on the assumption that there is an identifiable fund, such as the interest on the obligation to Prudential. We have concluded that as far as economic benefit and other ways this case is unique, and, while we conclude that a significant service was performed by the applicants, and there is strong evidence of economic benefit, especially in the testimony . . ."

The District Judge then proceeded to decide the claims of the different attorneys for fees. He noted that the claims had totaled a maximum of $1,750,000. His award was less than half of that sum, $750,000, augmented by $115,000 of prejudgment interest, an item contended by appellants to be unprecedented on these facts. The District Judge also ordered that ten per cent of the fee be awarded to Mesh, the attorney for Schoen, with the balance to be divided one-third each to the three law firms representing Ramey, Morelli and Harris, respectively. He also ordered that $326,290.90 be paid by the Scripps-Howard group, $393,333.60, plus $35,115.95 expenses, by the Enquirer, and $145,375.50 by American Financial Corp., which had, by court order, withheld $2.00 a share for legal fees when it bought the shares of the minority stockholders.

The principal appellate issues appear to us to be these:

1) Did this litigation produce such a benefit for the corporation (The Cincinnati Enquirer, Inc.) as to justify the award of fees?

2) Did the District Judge abuse his discretion by awarding excessive fees?

3) Was the award of prejudgment interest legally justified?

4) Assuming attorneys' fees were justified in some sum, could they legally be awarded against any party other than the Enquirer?

5) Did the District Judge commit error in dismissing the Scripps-Howard indemnity cross-claim against the Enquirer and AFC?

1) The Corporate and Stockholder Benefit

The District Court's proposed findings of fact and conclusions of law in the original derivative actions found violations

of state and federal laws that would have required preparation of an amended proxy statement and resubmission of the acquisition plan to the Enquirer shareholders. It is clear to this court that the District Judge made no findings of deliberate concealment or fraud. It also is clear that although appellants describe the violations found by the District Judge as "technical," nonetheless they would have served to require disclosures that would have alerted the Enquirer's minority stockholders further concerning the financial burden that their corporation was undertaking to assume.

There was testimony before the District Judge from which he could have concluded, as he did, that the Enquirer's management was proposing a high-risk plan. The cash payment of over one million dollars would have depleted the Enquirer's working capital, thereby impairing liquidity. The $16,500,000 obligation to Prudential, including the loan and the preferred stock, was about equal to the total asset value of the Enquirer. The plan would have raised the Enquirer's debt ratio to about 90% from a relatively low 21%. It is clear that such a highly leveraged capital structure could bring about a financial disaster if the Enquirer suffered even a temporary decline in revenues. The District Judge had ample reason to doubt that Enquirer earnings could service the Prudential loan and at the same time meet the preferred stock dividend and redemption requirements. Finally, we note that the plan of acquisition would have produced no corporate benefit for the Enquirer commensurate with the substantial debt that it would have assumed.

As we see the matter, plaintiffs' derivative suits succeeded in delaying consummation of the risky repurchase plan until two other companies made offers that would have accomplished the Scripps-Howard divestiture without the adverse effect upon the Enquirer's capital structure. Further, insofar as the derivative actions exposed inaccuracies and misleading statements in the proxy materials, this litigation constituted "corporate therapeutics," which benefits both the corporation

and its stockholders. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 396 (1970). The plaintiffs' efforts also conferred an incidental benefit upon all of the Enquirer's shareholders. Had the initial repurchase plan not been delayed, the more attractive AFC offer presumably would not have been made.

On the record before us, we cannot hold clearly erroneous the findings of the District Court that the plaintiffs' suits resulted in a substantial benefit to the Enquirer. FED. R. CIV. P. 52(a).

We conclude that the services performed by plaintiffs' attorneys justify an award of fees, even though no fund has been brought into court and even though it may be impossible to assign an exact monetary value to the benefit conferred upon the corporation. In this respect the present case is controlled by *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), in which the Supreme Court outlined the following definitive view on the award of attorneys' fees when no specific fund has been produced by the litigation:

> "While the general American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery. A primary judge-created exception has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself. See *Fleischmann Corp.* v. *Maier Brewing Co.*, 386 U. S., at 718-719. To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense. This suit presents such a situation. The dissemination of misleading proxy solicitations was a 'deceit practiced on the stockholders as a group,' *J. I. Case Co.* v. *Borak*, 377 U. S., at 432, and the expenses of petitioners' lawsuit have been incurred for the benefit of the corporation and the other shareholders.

"The fact that this suit has not yet produced, and may never produce, a monetary recovery from which the fees could be paid does not preclude an award based on this rationale. Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a 'common fund' for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses.

. . . .

"Other cases have departed further from the traditional metes and bounds of the doctrine, to permit reimbursement in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them. This development has been most pronounced in shareholders' derivative actions, where the courts increasingly have recognized that the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in the corporation's favor. For example, awards have been sustained in suits by stockholders complaining that shares of their corporation had been issued wrongfully for an inadequate consideration. A successful suit of this type, resulting in cancellation of the shares, does not bring a fund into court or add to the assets of the corporation, but it does benefit the holders of the remaining shares by enhancing their value. Similarly, holders of voting trust certificates have been allowed reimbursement of their expenses from the corporation where they succeeded in terminating the voting trust and obtaining for all certificate holders the right to vote their shares. In these cases there was a 'common fund' only in the

sense that the court's jurisdiction over the corporation as nominal defendant made it possible to assess fees against all of the shareholders through an award against the corporation.

"In many of these instances the benefit conferred is capable of expression in monetary terms, if only by estimating the increase in market value of the shares attributable to the successful litigation. However, an increasing number of lower courts have acknowledged that a corporation may receive a 'substantial benefit' from a derivative suit, justifying an award of counsel fees, regardless of whether the benefit is pecuniary in nature.

. . . .

"In many suits under § 14(a), particularly where the violation does not relate to the terms of the transaction for which proxies are solicited, it may be impossible to assign monetary value to the benefit. Nevertheless, the stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders." *Id.* at 391-96. (footnotes omitted.)

Moreover, the fact that these suits became moot does not preclude recovery of attorneys' fees. So long as a substantial benefit is conferred upon the corporation, it is not necessary that the litigation be brought to a successful completion. *Kahan* v. *Rosenstiel*, 424 F.2d 161, 167 (3d Cir.), *cert. denied*, 398 U.S. 950 (1970); *see Blau* v. *Rayette-Faberge, Inc.*, 389 F.2d 469, 473-74 (2d Cir. 1968).

We have no doubt that the District Court was warranted in awarding counsel fees to plaintiffs' attorneys.

2) Reasonableness of Fees

The trial judge in determining the value of services rendered by lawyers who have tried a case before him ordinarily has an infinitely better opportunity to evaluate those services

than does an appellate court. Therefore, appellate courts hold that the trial judge's determinations on legal fees should not be set aside unless there is a clear abuse of discretion.

In an early case the United States Supreme Court stated this principle clearly:

> "The conclusion to which we have come is that, under the circumstances of this case, the Circuit Court had the power, in its discretion, to allow to the complainant, Vose, his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund and causing it to be subjected to the purposes of the trust. The allowances made for these purposes we have examined, and do not find anything therein seriously objectionable. *The court below should have considerable latitude of discretion on the subject, since it has far better means of knowing what is just and reasonable than an appellate court can have." Trustees* v. *Greenough*, 105 U.S. 527, 537 (1881) (Emphasis added.)

This circuit over the years has pointed out the considerations that enter into the fixing of reasonable fees by the court. They include 1) the value of the benefit rendered to the corporation or its stockholders, 2) society's stake in rewarding attorneys who produce such benefits in order to maintain an incentive to others, 3) whether the services were undertaken on a contingent fee basis, 4) the value of the services on an hourly basis, 5) the complexity of the litigation, and 6) the professional skill and standing of counsel involved on both sides. *Denney* v. *Phillips & Buttorff Corp.*, 331 F.2d 249 (6th Cir.), *cert. denied*, 379 U.S. 831 (1964); *Pergament* v. *Kaiser-Frazer Corp.*, 224 F.2d 80 (6th Cir. 1955); *In re Detroit Int'l Bridge Co.*, 111 F.2d 235 (6th Cir. 1940).

Denney presents a fact situation quite similar to the instant case in that no cash fund ever was developed from which fees could be paid:

"The derivative action concerned the purchase by the respondent of 60,000 shares of stock, owned by the controlling stockholders, in Wm. R. Moore Dry Goods Company for $2,700,000. While the derivative action was pending and before it was assigned for trial, the officers and directors rescinded the purchase of the Moore stock. On the former appeal we held that the purchase of the stock, at least, constituted constructive fraud. On remand we instructed the District Court to require the defendants (officers and directors of the respondent) to pay to the respondent interest on $2,700,000 from the date of the commencement of the action to the date of rescission and to fix attorneys' fees for the petitioners. We held that the fact that the defendants rescinded the transaction before the court had an opportunity to pass upon the merits of the case would not defeat the right of counsel to compensation.

"The trial judge entered judgment for interest in the sum of $40,800. Counsel for the respondent claim that this was the only fund recovered for the corporation. They further claim that under Tennessee law an allowance of attorneys' fees must be limited to an amount commensurate with this recovery. In support of this theory, counsel cite Southern v. Beeler, Atty.-Gen., 183 Tenn. 272, 195 S.W.2d 857. More relevant to the issue in this case is Grant v. Lookout Mountain Co., 93 Tenn. 691, 28 S.W. 90, 27 L.R.A. 98. There the court held that since the minority stockholders by their action had benefited the corporation, it was therefore responsible for proper and reasonable attorneys' fees. The court further determined that the attorneys were entitled to a lien for their fees upon the land conveyed by the deeds which were canceled by the action of the minority stockholders.

"It cannot be said that the cancellation of the purchase of the Moore stock did not result from the action of the minority stockholders. Its cancellation inured to the benefit of the corporation by restoring $2,700,000 in assets in lieu of the Moore stock. After the rescission

of the purchase of the Moore stock, or its resale, the trial judge entered an order impounding $270,000 of the corporation's funds out of which attorneys' fees might be paid. This order was made without prejudice to the contentions of any of the parties.

"The court granted judgment in favor of the petitioners for $235,000 attorneys' fees and for $6,227.98 expenses. The trial judge found that the services were of vast proportions and that they were effective. He took into consideration the time spent by the lawyers, the complexity of the legal questions involved, the results accomplished, the professional standing of petitioners, and the professional standing of respondent's lawyers. He viewed the transaction in its entirety based upon all the facts in the case. The judge also took into account the public policy aspect to stockholders' derivative actions, i. e., that they serve a good purpose and should be encouraged rather than discouraged." *Id.* at 250-51.

The District Judge in the instant case found on substantial evidence that this was difficult and complex litigation, that the public had a stake in this and similar litigation, that the lawyers on both sides were competent and of high standing in their profession, and that plaintiffs' lawyers had contingent agreements that could not possibly compensate them (or encourage others) in relation to the services performed.

On the subject of amount of fees, the plaintiffs relied upon three witnesses, Mr. Jerome Goldman, Mr. James D. St. Clair, and Mr. Henry P. Jeffrey – all capable and experienced attorneys of excellent reputation. Their opinions as to fees earned in the subject litigation were $1,750,000, $1,500,000 and $1,250,000, respectively.

It does not appear to this court that the defendants ever really anticipated escaping from payment of substantial attorney fees.[5] They called as expert witnesses the Honorable Earl

[5] The District Judge said on this point:

"As the Court understands it, there is no dispute among the parties that the attorneys are entitled to fees. There is a

Morris, former President of the American Bar Association, and Mr. Thomas Conlan, a prominent member of the Cincinnati Bar. Morris' total estimate of an appropriate fee was just under $400,000 and Conlan's was $465,000. While the $750,000 awarded by the District Judge exceeds the defendants' estimates, it is approximately half of the plaintiffs' claims. As we have pointed out, the District Judge found that defendants' benefit from this litigation was substantial. He did not pin a specific figure upon the benefit, but he had before him testimony that would have allowed a finding of between $7,500,000 and $17,500,000. We find no abuse of discretion in the District Court's award of the sum total of fees.

We have considered the subsidary argument between the attorneys for plaintiffs in the consolidated cases, who had stipulated to an equal division of fees between three firms representing Ramey, Morelli and Harris, and attorney Mesh in the Schoen case. Similarly, we find no abuse of discretion, and no basis in law or fact for either setting aside or increasing the ten percent of the total fee awarded to Mesh, the attorney for plaintiff Schoen.

3) Prejudgment Interest

This court, however, finds no legal grounds for the $115,000 award of "prejudgment interest." The District Court said:

> "In fixing the amount of the award now the Court must also take into account the fact that it should have been fixed sixteen months ago, and would have been but for the fact that the Enquirer's application to have Scripps pay part or all of the fee was delayed and much time was taken to try to get the matter settled.
>
> "As a result the Enquirer and AFC have had use of the money, and, in that connection, a representative of AFC testified that they expected to make 15% per annum from

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dispute as to the amount to which they are entitled. In any event we conclude that the applicants are entitled to substantial fees and expenses herein."

> their capital. The money paid into a fund at the Court's direction when AFC offered to buy the minority shareholders has been on interest."

We recognize that some courts have regarded prejudgment interest as being justified by the need for adequate compensation so as to make the injured party whole. *See United States* v. *Michael Schiavone & Sons, Inc.*, 450 F.2d 875 (1st Cir. 1971); *Louisiana & Arkansas Ry.* v. *Export Drum Co.*, 359 F.2d 311 (5th Cir. 1966).

In the instant case, however, we feel that the attorneys involved have been compensated amply for their services by the District Judge's fee award. Obviously, the District Judge allowed fees based not on quantum meruit alone but in substantial part upon the favorable results of their labors. As we have noted, he made no findings of fraud or overreaching that might justify punitive damages. We find no evidence of dilatory tactics or purposeful delay on the part of defendants.

In the instant case the attorneys' fees ultimately allowed were not a liquidated sum or a sum certain until the entry of the District Court's judgment for fees filed on October 10, 1973. In a recent case the Ninth Circuit stated:

> "True, claims for 'reasonable' attorneys' fees, being unliquidated until they are determined by a court, are not entitled to pre-judgment interest as would be certain liquidated claims. But once a judgment is obtained, interest thereon is mandatory without regard to the elements of which that judgment is composed. *Cf.* United States v. Michael Schiavone & Sons, Inc., 450 F.2d 875 (1st Cir. 1971)." *Perkins* v. *Standard Oil Co.*, 487 F.2d 672, 675 (9th Cir. 1973).

The judgment of the District Court is modified to allow interest on the award of $750,000 in fees from October 10, 1973.

4) Liability for the attorneys' fees

We now turn to the question of whether the attorneys' fees can be awarded legally against any party other than the Enquirer.

This appeal grows out of derivative actions filed on behalf of the Enquirer by four of its minority stockholders. The Enquirer itself was named as a nominal defendant, but the real defendants were Scripps-Howard and individual officers and directors of the Enquirer. As the Ramey complaint makes clear, it was a corporate right of the Enquirer that the suits sought to enforce:

> "This action is filed on behalf of Enquirer for its benefit and the benefit of its shareholders as a shareholder's derivative action to enforce a right and cause of action of Enquirer which should be enforced by said corporation, but on which said corporation refuses to act because it is being prevented from so doing by the Board of Directors of Enquirer . . . ."

Thus it appears that this case presents typical derivative actions within the meaning of the conventional hornbook definition:

> "In legal effect, a stockholders' suit is one by the corporation conducted by the stockholder as its representative. The stockholder is only a nominal plaintiff, the corporation being the real party in interest.
>
> "The suit is a derivative one, and is to be distinguished from a representative action brought by a stockholder as an individual and for his own benefit in behalf of himself and other stockholders similarly situated. Where plaintiff does not seek to enforce relief for the benefit of the corporation, it is not derivative and not a stockholders' suit." 13 W. FLETCHER, PRIVATE CORPORATIONS § 5939 (perm. ed. 1970) (footnotes omitted).

It is a general principle of corporate law that a minority stockholder who proceeds at his own expense in a derivative

action resulting in a substantial benefit to the corporation is entitled to recover reasonable counsel fees from the corporation that has benefitted from his efforts. *See* 19 AM. JUR. 2d *Corporations* § 588, at 111 (1965); 13 W. FLETCHER, PRIVATE CORPORATIONS § 6045 (perm. ed. 1970); 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2675 (1973); Annot., *Litigation Expense — Corporate Charge,* 39 A.L.R.2d 580, 583 (1955); Annot., *Litigation Expense — Corporation Liability,* 152 A.L.R. 909, 914 (1914).

The cases make it clear that "[t]he obligation to reimburse a shareholder who brings a successful derivative suit is an obligation of the corporation." *Levine* v. *Bradlee,* 378 F.2d 620, 622 (3d Cir. 1967). *See Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 389-90 (1970) (assessing fees against corporation); *Kahan* v. *Rosenstiel,* 424 F.2d 161, 167 (3d Cir.), *cert. denied,* 398 U.S. 950 (1970) ("In derivative suits . . . the corporation which benefits from the suit . . . is directed to pay [attorneys' fees]."); *Denney* v. *Phillips & Buttorff Corp.,* 321 F.2d 249 (6th Cir.), *cert. denied,* 379 U.S. 831 (1964) (assessing fees against corporation). Counsel fees in such cases are not awarded individually against other stockholders who may have profited from the derivative litigation, but against the corporation. Speaking for the court in *Jones* v. *Uris Sales Corp.,* 373 F.2d 644, 648 (2d Cir. 1967), Judge Friendly explained the rationale for this rule as follows:

> "[T]he reason for the award of such fees in a stockholder's derivative suit . . . [is] that the plaintiff's efforts have conferred on the corporation a benefit for which the corporation would otherwise have had to pay itself."

The present derivative actions were filed by minority stockholders of the Enquirer, not by minority stockholders of Scripps. There was no attorney-client relationship, derivatively or otherwise, between Scripps and the attorneys representing the four plaintiff minority shareholders.

Absent a finding that Scripps or the minority stockholders acted fraudulently or "in bad faith, vexatiously, wantonly, or for oppressive reasons," *Hall* v. *Cole,* 412 U.S. 1, 5 (1973), there is no legal basis for awarding any part of the attorneys' fees against the Scripps group or against the minority shareholders.[6] Under the controlling law set forth above, the entire fee must be assessed against The Cincinnati Enquirer, Inc., the corporation whose stockholders initiated the derivative action.

The fact that the Scripps group and the minority stockholders profited from the sale of their stock at higher prices than those provided in the original contract is no basis for assessing against them any part of the attorneys' fees awarded to counsel who filed the derivative actions on behalf of the Enquirer. Incidental benefits to Scripps or minority stockholders, in the absence of an adjudication of fraud or misconduct on their part, does not justify a judgment against them for any part of the attorneys' fees. *See Schleit* v. *British Overseas Airways Corp.,* 410 F.2d 261, 262 (D.C. Cir. 1969); *Preston* v. *United States,* 284 F.2d 514, 515-16 (9th Cir. 1960); *Jett* v. *Merchants & Planters Bank,* 228 F.2d 156, 159 (4th Cir. 1955).

Accordingly, the judgment of the District Court filed October 10, 1973, is vacated insofar as it awards any part of the attorneys' fees therein adjudicated to be paid by any party other than The Cincinnati Enquirer, Inc.

It appears that, pursuant to an order of the District Court, $2.00 per share was withheld from the purchase price received by some of the minority shareholders who accepted the AFC tender offer. This fund was to be used for payment of plaintiffs' attorneys' fees. In view of the foregoing opinion, it

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[6] The only authority directly supporting an assessment against Scripps and the minority shareholders appears to be one law review article. Cole, *Counsel Fees in Stockholders' Derivative and Class Actions — Hornstein Revisited,* 6 U. RICHMOND L. REV. 259, 279-81 (1972). Suffice it to say that we do not agree with the author's conclusions.

is clear that the sums so withheld must be paid to the shareholders affected. To the extent, however, that AFC contributed its own money to this fund, it may, if it wishes, make this fund available for payment of the attorneys' fees assessed against the Enquirer, its wholly-owned subsidiary.

5) Scripps Cross-Claim

Scripps filed a cross-claim against the Enquirer on the basis of pendent jurisdiction, seeking to recover $291,842.29 in attorneys' fees and other expenses incurred by Scripps in the trial of these cases and $173,029.75 in attorneys' fees and other expenses incurred by Scripps in connection with the application for fees filed by plaintiffs' counsel. The District Court declined to accept pendent jurisdiction of this cross-claim. We hold that the District Court did not abuse its discretion in this respect.

6) Conclusion

The case is remanded to the District Court for further proceedings not inconsistent with this opinion, including modification of the judgment of October 10, 1973, so as to require payment by The Cincinnati Enquirer, Inc., of the fees allowed to the respective counsel, plus interest from October 10, 1973.

The costs of this appeal are taxed against The Cincinnati Enquirer, Inc.

APPENDIX D

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JEAN WHITEHOUSE RAMEY, *Plaintiff*

v.

THE CINCINNATI ENQUIRER, INC., ET AL., *Defendants*

No. 7704

ANGIOLINA MORELLI, *Plaintiff*

v.

THE CINCINNATI ENQUIRER, INC., ET AL., *Defendants*

No. 7707

ALBERT HARRIS, *Plaintiff*

v.

RICHARD D. ALDER, ET AL, *Defendants*

No. 7720

CECIL F. SCHOEN, A.K.A. CECILE F. SCHOEN, etc., ET AL, *Plaintiffs,*

v.

THE CINCINNATI ENQUIRER, INC., ET AL., *Defendants*

No. 7734

ORDER AND DECREE

The above-named cases came on to be heard on the joint applications of the plaintiffs' counsel in the consolidated cases of *Ramey, Morelli* and *Harris*, and the separate application of plaintiff's counsel in the case of *Schoen*, for an award of reasonable counsel fees and reimbursement of their costs in this litigation, the Court, upon consideration of the evidence presented to the Court in open hearings by all parties, the representations of plaintiffs' counsel at such open hearings, the applications for attorneys' fees and expenses and the memoranda in support thereof, as well as the memoranda in opposition thereto, and the entire record heretofore made in this litigation, as well as the record in case No. 5656, *United States of America v. E. W. Scripps Company*, and being fully advised in the premises, finds as follows:

1. That the attorneys for the plaintiffs have rendered valuable legal services in this litigation, for which they should be reasonably compensated, and they have incurred expenses for which they should be reimbursed, the respective amounts being hereinafter set forth.

2. That the attorneys' fees awarded herein, although less than the amount requested by all of plaintiffs' counsel, are fair, just and reasonable in light of the moderate size of corporation involved and its ability to pay, the nature and extent of the significant services rendered, the unique and substantial benefits accorded to The Cincinnati Enquirer, Inc. and its shareholders by plaintiffs' counsel's efforts in this litigation, and the factors considered by the courts in the determination of attorneys' fees in such cases.

3. That the expenses for which reimbursement is ordered are reasonable in amount and were necessarily incurred by plaintiffs' attorneys in connection with this litigation.

4. That the defendant, The Cincinnati Enquirer, Inc., and all of its shareholders, including the Scripps Group, have received substantial benefits, both tangible and intangible, as a result of

this litigation, and the payment of the award of fees and costs should be allocated among those so benefitted.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, THAT

1. The Scripps Group, The Cincinnati Enquirer, Inc. and American Financial Corporation, on behalf of those Enquirer shareholders who sold or exchanged their Enquirer shares with AFC, as a result of its tender offer of February 18, 1971, shall pay to the attorneys for plaintiffs reasonable attorneys fees and shall reimburse them for their respective expenditures as follows:

Attorneys	Fees	Expenses
A. Goldman, Cole & Putnick of Cincinnati, Ohio, Attorneys for the Plaintiff in the action entitled, Jean Whitehouse Ramey v. The Cincinnati Enquirer, Inc., et al. No. 7704	$259,000.00	$12,225.70
B. Bauer, Morelli & Heyd, of Cincinnati, Ohio, Attorneys for the Plaintiff in the action entitled Angiolina Morelli v. The Cincinnati Enquirer, Inc. No. 7707	$259,500.00	$ 4,410.52
C. Cors, Hair & Hartsock of Cincinnati, Ohio, and Pomerantz, Levy, Jaudek and Block, of New York City, Attorneys for the Plaintiff in the action entitled Albert Harris v. Rilchard D. Alder, et. al, No. 7720	$259,500.00	$ 5,403.29

D. Gene I. Mesh of Cincinnati, Ohio, Attorney for Cecil F. Schoen, aka Cecile F. Schoen v. The Cincinnati Enquirer, Inc., et al, No. 7734	$ 86,500.00	$13,076.45
Total	$865,000.00	$35,115.96

2. The Court does hereby order that the payment of such fees and expenses shall be made by the following corporations:

A. The Scripps Group is hereby ordered to pay $326,290.90.

B. The Cincinnati Enquirer, Inc. is hereby ordered to pay $393,333.60 of the fees and $35,115.96 of the expenses.

C. American Financial Corporation is hereby ordered to pay on behalf of those former Enquirer shareholders who as a result of the AFC tender offer of February 18, 1971, sold their Enquirer shares to AFC for cash (26,843¾ shares) the sum of $13,421.84 of the fees and expenses.

D. American Financial Corporation is hereby ordered to pay on behalf of those former Enquirer shareholders who, as a result of the AFC tender offer of February 18, 1971, exchanged their Enquirer shares for AFC securities (263,907¾ shares) the sum of $131,953.66 of the fees and expenses.

3. The Court declines to accept pendent jurisdiction of the counterclaim filed by the Scripps Group against The Cincinnati Enquirer, Inc., in connection with the allocation of the attorneys' fees and expenses.

4. This litigation is now finally dismissed as moot and without reservation of jurisdiction.

5. The reasonable attorneys' fees and expenses herein ordered, unless paid within one week from the date of this order shall bear interest at the legal rate until paid.

United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JEAN WHITEHOUSE RAMEY,
Plaintiff,
v.
THE CINCINNATI ENQUIRER, INC., ET AL.,
Defendants.
NO. 7704

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THE CINCINNATI ENQUIRER, INC., ET AL.,
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NO. 7707

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v.
RICHARD D. ALDER, ET AL.,
Defendants.
NO. 7720

CECIL F. SCHOEN, a.k.a. CECILE F. SCHOEN, etc., ET AL.,
Plaintiffs,
v.
THE CINCINNATI ENQUIRER, INC., ET AL.,
Defendants.
NO. 7734

OPINION
(ON APPLICATION FOR FEES)

PORTER, J.: This is the Court's decision on the application of counsel for fees in four stockholder derivative actions. Three of these will be referred to as the "consolidated cases." They are *Ramey* (7704), *Morelli* (7707), and *Harris* (7720). They were filed October 4, 7 and 20, 1970, and were consolidated for trial. The *Schoen* case (7734) was filed a little later. It will be referred to as the "*Schoen* case," and, for convenience, when reference is made to all four, it will be as "the Enquirer case."

Such "case" grew out of the attempt late in 1969 by the Enquirer to buy the Enquirer, *i.e.*, the corporation sought to purchase the interest of the majority shareholders, the Scripps group. The same offer made by the corporation to the Scripps group was *not* made to the plaintiffs or other minority shareholders.

The price was $17.5 million, with $1,026,748 cash and the rest financed through Prudential Life Insurance Company in a very complicated transaction, part of which was a loan bearing 12% interest and the rest raised from the sale of preferred stock—or issuance of preferred stock—stock with so many features a serious question was raised as to whether it was debt or equity. The significance of that will be explained herein. Suffice it to say here that the complexity of the financing cannot be fully appreciated without at least a perusal of the proxy statement and, for that reason, a copy of it is attached.

In retrospect it may be said that it was inevitable that one or more derivative suits would be filed. One reason this can be said is that the policy of the law is to encourage such actions. But the main reason is that the Enquirer is an institution as well as a corporation, and, as an institution, it has a history, though distinguished, not without dissension in the ranks of its stockholders. Hence, though every aspect of the deal and proxy statement was worked on with great competence and care, it came as no surprise to either the Enquirer or the Scripps group that the consolidated actions were filed before the scheduled shareholders' meeting to vote on management's proposal that the Enquirer buy out the majority shareholders.

Later (October 20) the *Morelli* case was filed; then *Schoen* (No-

vember 2), and somewhere along the line still another case was filed in Common Pleas Court. To have delayed a hearing on the merits after the ones filed in this Court were at issue would have been to let the transaction go by default under a litigation escape clause in the contract. Hence, the case was assigned for hearing as soon as it was at issue and lasted over a period of two months, greatly exceeding counsels' estimate that it would take approximately eight days. The questions presented were then briefed and the case submitted on the merits.

At that advanced stage the Scripps group opted out under the escape clause and took a better offer which did run to all shareholders and not just a majority.

Applications for fees were made in due course and were submitted on evidence as to the nature and extent of the services, expert opinions on economic benefit to the Enquirer which resulted from the services, and also expert opinions as to the value of the services. Then there was a hearing on the Enquirer's motion to require the Scripps group to pay all or part of the fees eventually awarded.

The record before the Court includes that of the main case. It also includes, by agreement again, the record in Case No. 5656, the civil antitrust suit by the government against E. W. Scripps Company, which ended in a 1967 consent decree ordering Scripps to divest itself of its interest in the Enquirer. Of course, it includes eight days of testimony, oral argument, briefs and the application and affidavits.

I.

We turn to a discussion of the applicable rules and findings as to all matters pertinent under such rules, conclude what the total fee should be (page 21), find what percentage should be awarded in the *Schoen* case (page 27), how the total should be allocated among the stockholders, the Scripps group and the Enquirer (page 28).

As the Court understands it, there is no dispute among the parties that the attorneys are entitled to fees. There is a dispute as to the amount to which they are entitled. In any event we conclude

that the applicants are entitled to substantial fees and expenses herein.

We begin the discussion of the applicable rules by quoting at length, footnotes and all, from the latest Supreme Court case on the subject. This is *Hall* v. *Cole*, _____ U.S. _____ (41 U.S.L.W. 4658, May 21, 1973), where the Court said the following:

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Although the traditional American[4] rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory[5] or contractual authorization,[6] federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation." *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 166 (1939), and federal courts do not hesitate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391–392 (1970); see *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 Moore's Federal Practice 1352 (1966 ed.); see, *e.g.*, *Newman* v.

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[4]The American rule, it might be noted, is more restrictive than the general rule that prevails in most other nations. See, *e. g.*, Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 34 Calif. L. Rev. 792, 793 (1966). Many commentators have argued for a "liberalization" of the American rule. See, *e. g.*, Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202 (1966); Ehrenzweig, *supra;* Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 Iowa G. Rev. 75 (1963); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619 (1931); Comment, The Allocation of Attorney's Fees After *Mills* v. *Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316 (1971); Note, Attorney's Fees: Where Shall the Ultimate Burden Lie?, 20 Vand. L. Rev. 1216 (1967).

[5]See, *e. g.*, Clayton Act, § 4, 38 Stat. 731, 15 U.S.C. § 15; Communications Act of 1934, § 206, 48 Stat. 1072 47 U.S.C. § 206; Interstate Commerce Act, § 16, 34 Stat. 390, 49 U.S.C. § 16 (2); Securities Exchange Act of 1934, § § 9 (e), 18 (a), 48 Stat. 890, 897, 15 U.S.C. § § 78i (e), 78r (a).

[6]See, *e. g.*, *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717 (1967); *Hauenstein* v. *Lynham*, 100 U.S. 483 (1880); *Day* v. *Woodworth*, 13 How. (54 U. S.) 363 (1852).

Piggie Park Enterprises, Inc., 390 U.S. 400, 402 n. 4 (1968); *Vaughan* v. *Atkinson*, 369 U.S. 527 (1962); *Bell* v. *School Bd. of Powhatan County*, 321 F. 2d 494 (CA4 1963); *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F. 2d 473 (CA4 1951). In this class of cases, the underlying rationale of "fee-shifting" is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of "bad faith" on the part of the unsuccessful litigant.

Another established exception involves cases in which the plaintiff's successful litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Mills* v. *Electric Auto-Lite, supra*, at 393–394.[7] "Fee-shifting" is justified in these cases, not because of any "bad faith" of the defendent but, rather, because "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contrib-

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[7]This exception has its origins in the "common-fund" cases, which have traditionally awarded attorneys' fees to the successful plaintiff when his representative action creates or traces a "common-fund," the economic benefit of which is shared by all members of the class. See, *e. g.*, *Central Railroad & Banking Co.* v. *Pettus*, 113 U.S. 116 (1885); *Trustees* v. *Greenough*, 105 U.S. 527 (1882). In *Sprague* v. *Ticonic National Bank, supra*, the rationale of these cases was extended to authorize an award of attorneys' fees to a successful plaintiff who, although on her own behalf rather than as representative of a class, nevertheless established the right of others to recover out of specific of the same defendant through the operation of *stare decisis*. In reaching this result, the Court explained that the beneficiaries of the plantiff's litigation could be made to contribute to the costs of the suit by an order reimbursing the plaintiff out of the defendant's assets from which the beneficiaries eventually would recover. Finally, in *Mills* v. *Electric Auto-Lite Co., supra*, we held that the rationale of these cases must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation " 'which corrects or prevents an abuse which would be prejudical to the rights and interests' " of those others. *Id.*, at 396, quoting *Bosch* v. *Meeker Cooperative Light & Power Assn.*, 257 Minn. 362, 367, 101 N. W. 2d 423, 427 (1960).

Citing our decisions in *Mills* and *Newman* v. *Piggie Park Enterprises. Inc., supra*, respondent contends that the award of attorneys' fees in this case might also be justified on the ground that, by successfully prosecuting this litigation, respondent acted as a " 'private attorney general' vindicating a policy that Congress considered of highest priority." *Newman* v. *Piggie Park Enterprises. Inc., supra*, at 402. See also *Knight* v. *Auciello*, 453 F. 2d 852 (CA1 1972); *Lee* v. *Southern Home Sites Corp.*, 444 F. 2d 143 (CA5 1971). In light of our conclusion with respect to the "common benefit" rationale, however, we have no occasion to consider that question.

uting equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Id.*, at 392; see also *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* at 719; *Trustees* v. *Greenough,* 105 U.S. 527, 532 (1882). Thus, in *Mills* v. *Electric Auto-Lite Co., supra,* we approved an award of attorneys' fees to successful shareholder plaintiffs in a suit brought to set aside a corporate merger accomplished through the use of a misleading proxy statement in violation of § 14 (a) of the Securities Exchange Act of 1934. 15 U.S.C. § 78n (a). In reaching this result, we reasoned that, since the dissemination of misleading proxy solicitations jeopardized important interests of both the corporation and " 'the stockholders as a group,' "[5] the successful enforcement of the statutory policy necessarily "rendered a substantial service to the corporation and its shareholders." *Mills* v. *Electric Auto-Lite Co., supra,* at 396. Under these circumstances, reimbursement of the plaintiffs' attorneys' fees out of the corporate treasury simply shifted the costs of litigation to "the class that has benefited from them and that would have had to pay them had it brought the suit." *Id.*, at 397.

The Enquirer case falls under *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970). As that implies, there was no bad faith.

It is next in order to note what the Court said in *Sprague* v. *Ticonic National Bank,* 307 U.S. 161, 167 (1939), namely:

> " . . . . As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility. . . ."

Thus, each case stands on its own; the question of the amount of fees is one addressed to the discretion of the Court; and the Court is under a duty to carefully exercise such discretion. According to a leading article on the subject (Professor Hornstein, "Counsel Fee Award," 69 Harv. L. Rev. 658, 681 (1956), the general rule about attorney fees in a stockholders' derivative action is that the amount is almost entirely within the discretion of the

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[5] *Mills* v. *Electric Auto-Lite Co., supra,* at 392, quoting *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 432 (1964).

trial judge. The discretion is subject only to the limitation that the award be fair and reasonable, and it is helpful to note that there is a national average in this type of case after it has been fully litigated of slightly over 20% of recovery made on behalf of the corporation.

Though the Court has wide latitude in the exercise of its discretion, there are guidelines and we are controlled by those laid down by the Sixth Circuit in *Denny* v. *Phillips & Buttorf Corp.*, 301 F. 2d 249, cert. den., 379 U.S. 831 (1964). There the Court said the *criteria* in fee award cases are:

> The amount and effectiveness of the services; The professional standing of plaintiffs' attorneys; The standing of defendants' lawyers; The public policy that such suits serve a good purpose and should be encouraged.

In addition the amount of recovery or economic benefit plays an important part as well as the number and complexity of the factual and legal problems.

II.
FINDINGS ON MATTERS PERTINENT UNDER THE RULES

The consolidated cases were initiated by complaints filed October 16, 20 and 26, 1970, and the pleadings in the cases as submitted were amended complaints of the plaintiffs and answers filed thereto. By agreement of all parties except the Scripps group at the commencement of the litigation a temporary restraining order was entered restraining consummation of the agreement of acquisition of the Scripps-Howard stock by the Enquirer as set forth in the proxy statement (but letting the October 23 meeting go ahead).

All defendants filed motions for summary judgment and memoranda in support thereof, and there were opposing memoranda filed on behalf of the plaintiffs. The motions were argued November 17, 1970, and the Court overruled the motions for summary judgment on November 18, 1970.

In preparation for trial counsel for the plaintiffs examined thousands of documents in the files of the Enquirer, the account-

ing firm of Peete, Marwick, Mitchell and Company, Cincinnati, Ohio, and the Prudential Insurance Company of America in Newark, New Jersey, and took depositions of various defendants and accounting personnel.

The trial of the cases commenced November 18, 1970, and terminated January 18, 1971, and involved 32 days of trial. The transcripts of testimony consisted of 5,739 pages, and 352 exhibits were introduced. Briefs on the merits were filed simultaneously on January 27, 1971, and reply briefs on January 31, 1971.

Under the consent decree issued November 12, 1968 in Case No. 5656 in this Court the Scripps group described in the proxy statement was required to divest itself of all of their 501,896 shares of Enquirer stock and the extended date by which they had to make such divestiture was about to expire on February 11, 1971.

On that date the Scripps group refused to extend its contract with the Enquirer to sell their stock to the Enquirer. The government requested the Court in Case No. 5656 to require the Scripps group to extend the contract. The Court refused. This decision of the Court was entered while consummation of the plan as set forth in the proxy statement was being prevented by temporary restraining order and after the cases had been fully tried, briefed and argued, and while the Court had the case under submission.

On February 18, 1971, after the Court announced its tentative conclusions, American Financial Corporation made an offer to pay the Scripps-Howard group $40 per share in cash for 501,896 shares held by that group. This offer ran to all shareholders. It was accepted February 19, 1971, and the total purchase price has been paid to the Scripps-Howard group. The offer to other shareholders was $40 in cash, or, in the alternative, at the shareholder's option, to exchange American Financial securities for each share of Enquirer. American Financial Corporation acquired 94% of the Enquirer stock and later forced a sale of the rest, so it now holds 100% of the Enquirer stock.

The plaintiffs in the consolidated cases were represented by the Cincinnati firm of Goldman, Cole and Putnick, a leading

lawfirm of Cincinnati, Ohio, represented principally by Jerome Goldman and Douglas G. Cole. Goldman has been in practice in excess of 38 years and extensively engaged in corporate and business matters. Cole has been in practice 23 years, and both have been engaged previously in complex litigation.

In the *Morelli* case, the plaintiff's attorneys were Bauer, Morelli and Heyd, a leading Cincinnati firm, represented principally by Arnold Morelli and Charles Heyd, both of whom were former Assistant United States Attorneys with broad trial experience, Morelli having been an attorney for 19 years and Heyd for 9.

Mr. Harris was represented by Cors, Hair and Hartsock, another leading lawfirm of Cincinnati. Members of the firm who were working on the case were plantiff's son, Irving Harris and William Kohlhepp. Harris had been involved in other litigation of complex cases, having been a lawyer for 19 years. He was one of the Attorneys in this case who was also in the *Ohio Casualty* case referred to herein, and associated with them were the firm of Pomerantz, Levy, Haudek and Block, of New York City, a leading firm nationally in shareholder derivative suits, and on its behalf Abraham L. Pomerantz, who has been in practice for 45 years and who is nationally recognized as an authority in shareholder derivative suits and other complex litigation and who has enjoyed great success in this field. Mr. Pomerantz was also in the *Ohio Casualty* case.

The firm of Frost & Jacobs and the firm of Goldman, Cole and Putnick were likewise engaged in the *Ohio Casualty* case.

At the outset Messrs. Pomerantz and Goldman could be termed "lead counsel" with the others playing important but lesser roles. Mr. Pomerantz had to withdraw from actual participation in the trial after a week, though he remained active in cooperation with Mr. Harris after that. Following Mr. Pomerantz's withdrawal, the burden fell on Mr. Goldman. All those who had any part in this case must recognize not only that Mr. Goldman was equal to the occasion, but his representation of the plaintiffs required outstanding ability and physical stamina as well. In almost 25 years as a trial judge I have not witnessed anything like it.

The defendants, The Cincinnati Enquirer, Inc., and the indi-

vidual directors thereof, were represented by the firm of Frost & Jacobs, another leading Cincinnati firm, and partners and associates who participated were the late John C. Egbert, John A. Lloyd, Jr., Dennis J. Barron, John Stith, and Robert A. Dimling.

The Scripps group was represented by the nationally known Cleveland firm of Baker, Hostetler and Patterson (67 lawyers) and principally represented by Richard F. Stevens, one of the leading trial lawyers of the midwest, with 38 years experience as a trial lawyer in professionally demanding cases. He was ably assisted by H. Stephen Madsen and Sherman Dye, both experienced lawyers, and their local associate was James W. Hengelbrok, of Gorman, Davis, Hengelbrok and Price, himself an experienced trial lawyer.

In preparation for trial and discovery and in the actual trial of the case, including conferences with the Court and preparation and argument on motions, preparation of pleadings, briefs and arguments, research and other activities, Goldman and Cole spent 1505 hours and 10 minutes; Morelli and Heyd, 1037 hours and 30 minutes; Harris, Kohlkepp and Glaser, 853 hours; Pomerantz and others in his firm a lesser number.

Thus it can be seen that the amount of service was substantial timewise. The Court also finds it was demanding from a professional standpoint because there were numerous questions and some of them were extremely complex.

Next, it needs to be noted that the fees were contingent. Also, the professional standing of all of the plaintiffs' attorneys was of the highest, and that is true of defendants' lawyers as well.

This high standing was put to the test in this lawsuit, and all counsel came through with flying colours, Plaintiffs' counsel had to make a quick analysis of a complex transaction. In doing so and predicting its effects they had the benefit of the work of Mr. William L. McGrath on many, if not most of the factual problems. Mr. McGrath, a highly successful businessman, was a director of the Enquirer who vigourously opposed the transaction at every turn and wrote letters, many of which were exhibits in the "main case," confirming his strong views.

Nevertheless, there was an immense amount of work for

plaintiffs' counsel in getting around the many factual questions involved, and as much, if not more, work on the legal questions involved. Such questions were inherent in the transaction. The purchase by a corporation of its own shares has a potential for abuse, and restrictive legislation has therefore grown up to meet the need to prevent such abuse. Hence, any time a corporation attempts to purchase its own shares, especially on a shoestring, the transaction has to be cast in a form which meets the legal requirements and a number of extremely difficult questions in the area of corporate law and finance arise. One restriction on purchase by a corporation of its own shares is the Impairment of Capital Statute, Ohio Revised Code 1701.35, which provides that after such purchase the "debts" of the corporation must not exceed its assets plus "stated capital." That explains why only so much money could be borrowed from Prudential and the balance had to be raised by sale of preferred stock which could be determined to be "equity" and not "debt." In this case the preferred stock had warrants, voting powers, conversion privileges, redemption and other rights, and a difficult and serious question was presented as to whether, though cast in the form of "equity," it was not in law and in fact "debt." If the shares were "debt," the assets of the Enquirer after the purchase of the Scripps shares would not have exceeded debts plus stated capital as required by ORC 1701.35, and the deal would have been illegal.

That was just one of many complex questions. Another involved the corporate power and many others arose in connection with the proxy statement and the claims that statements therein were materially misleading. One of these was that it was not accurate in its portrayal of the effect of the deal on the Enquirer's ability to pay dividends and its dividend policy. Another was that in describing the effect of the plan on the book value of the Enquirer stock (proxy statement, p. 6) instead of a drop from plus $15.42 per share to "none," the proxy statement should have shown a drop from $15.42 to *minus* $13.07.

To appreciate the nature of the questions which arise when a corporation proposes to purchase the interest of its majority shareholders (and the offer does not run to all shareholders) a

consideration of the literature on the subject is necessary. The Court had to examine the literature in the main case to determine whether the Scripps-Enquirer deal violated the Ohio Impairment of Capital Statute, ORC 1701.35. We found particularly helpful a 1966 article in the Fordham Law Review, Vol. 28, page 637, entitled "Share Repurchases under Modern Corporation Laws," by Robert A. Kessler. More recent literature includes: Note: "The Current Law Regarding Reduction of Capital: Its Methodology, Purpose and Dangers," 110 U. Pa. L. Rev. 732 (1962); Israels, "Corporate Purchase of Its Own Shares-Are There New Overtones," 50 Cornell L. Q. 620 (1965); Israels, "Limitations on the Corporate Purchase of Its Own Shares," 22 Southwestern L. J. 755 (1968); Zilber, "Corporate Tender Offers for Their Own Stock: Some Legal and Financial Considerations," 33 U. Cinn. L. Rev. 315 (1964).

Texts considered include: Henn, Corporations (2d Ed., 1961), §§ 175, 176, 335, 336; Townsend's Ohio Corporation Law, Ch. 15, especially § 15.5; Fletcher, Cyclopedia of Corporations, in which at § 2849, p. 370 is the statement:

> "Most of the statutes now provide that the purchase may be made only from surplus of one kind or another with varying definitions of 'surplus.' "

In note 43 it is observed that Ohio's 1701.01 does not contain any definition of "surplus."

Not only is "surplus" not defined in Ohio, but neither is "stated capital." Since it can be manipulated, it simply reflects the will of the majority of the shareholders (or the directors, if they are authorized by the articles to acquire the corporation's stock) as to what amount of capital is not available for acquisition by the corporation of its own shares and distribution to shareholders of dividends. Thus, in the Enquirer case, by deciding to change stated capital as proposed from $5 per share to $1 per share, the shareholders were saying in effect they chose to embark on the proposed corporate venture and in order to do so to completely change the capital structure of the Enquirer, eliminate the shareholders' equity, change its stock from "safe" to "risky," and agreed to pay for the outstanding shares out of fu-

ture earnings.

Another text is Cavitch, Ohio Corporation Law. In § 9.32(2), p. 310, § 8.22, it is noted that stated capital is not defined in ORC 1701.01, though it is referred to extensively in 1701.30.

We also considered the commentary and the chapter on the Model Corporation Act—the commentary to § 5, "Right of corporation to acquire and dispose of its own shares." This points out that most statutes, like the Model Act, provide in substance that a corporation's own shares shall be purchased only out of surplus except in special situations specified in the statute. And of the many cases, one which we found noteworthy is *Mountain States Steel Foundries, Inc.* v. *C.I.R.*, 284 F. 2d 737 (5 Cir., 1960), where an impairment statute similar to Ohio's was under the glass.

This should suffice to underline that a proposed acquisition of the Enquirer of its own shares, cast in the form it was, was not only "thin" financially, but legally as well.

In addition to the questions discussed above, there were others, most of which are discussed in the opinion of the Court in the main case, and we turn now to an explanation of why the opinion was announced, even though the case was moot.

For one thing, the lawyers had worked so hard they deserved to know how they would have come out if the case had not been mooted. More importantly, the decision was announced so that the Enquirer (if the Enquirer decided to and was permitted to intervene) could decide whether or not it was worthwhile to appeal an order in Case No. 5656, *United States of America* v. *E. W. Scripps Company*, which, of course, was the antitrust case in which there was a consent order under which Scripps had to divest itself of the Enquirer stock by a certain date. The divestiture deadline was continued from time to time and after the Enquirer case was submitted it was expected that Scripps would apply for and obtain still another extension because of the pendency of this litigation. However, during the litigation the Scripps group kept its options open, *i.e.*, entertained offers. When the Enquirer litigation was over and the matter submitted to the Court for the decision, along came an offer (the Blue Chip Offer) for $35 a

share. This ran to all shareholders (as distinguished from the Enquirer offer which ran only to the majority shareholders). Scripps decided not to ask for an extension (in 5656) of the time within which it had to divest.

Earlier in 5656 the Enquirer tried to intervene in order to oppose a Scripps application for such an extension. It was extremely unlikely that the Enquirer would have been allowed to intervene at the point when it attempted to do so. Before the Court ruled thereon the Enquirer withdrew its application.

When Scripps decided not to ask for an extension of the time within which it could divest, the government moved that Scripps be compelled to go ahead with its contract with the Enquirer. This was denied. The government decided not to appeal. It was the Court's view at that time that the Enquirer's position was changed, and the Enquirer was practically invited to renew its application to intervene so that if it desired to do so, *it* could appeal the Court's decision denying the government's request that Scripps be compelled to complete its deal with the Enquirer. It did not ask to intervene.

That brings us to the issue of economic benefit.

There was testimony about this in the hearing on the application for fees. There was also testimony in the main case which bore indirectly on this, *e.g.*, the testimony of Charles Sawyer and William L. McGrath regarding the effect of the assumption of the $17.5 million "obligation" (if not debt) on the ability of the Enquirer to pay dividends or even survive. Hence, the conclusion was inescapable that much of the testimony on this subject in the hearing on the application for fees was cumulative.

As to economic benefit, while there is dispute, this much can be said. If the Enquirer had purchased the Scripps shares, that is, if the plan had not been restrained, the Enquirer would have paid out $17.5 million in principal and would have lost the income on investments owned by it which had to be liquidated to apply on the purchase price of the stock in the sum of $1,026,748. In addition, the Enquirer would have obligated itself to interest payment on the loan of $15,975,000, and dividend payments on preferred stock of $4,590,000, and payment of pre-

miums on required preferred stock redemption of $600,000, which payments would have totaled $22,191,748, in addition to the $17.5 million in principal previously stated. Also, as to economic benefit, it can be said that the *corporation*, as Mr. Goldman contended, received nothing for the $17.5 million it paid for its own stock, or would have paid. If the deal had gone through, the book value of the stock would have gone from plus to minus, and it is probable the market value would have gone way down, at least temporarily. An incidental benefit conferred on the shareholders was that in the time it took to litigate Scripps kept its option open, and along came the Blue Chip offer to all shareholders for $35 a share, and the AFC offer to all shareholders of $40 a share, the difference between $40 and $35 being about $2.5 million or more to Scripps alone.

Nevertheless, in fixing the fee we have not gone on the assumption that there is an identifiable fund, such as the interest on the obligation to Prudential. We have concluded that as far as economic benefit and other ways this case is unique, and, while we conclude that a significant service was performed by the applicants, and there is strong evidence of economic benefit, especially in the testimony of Mr. Sawyer and Mr. McGrath, we cannot put a figure on it, though we can say it is substantial.

From all the foregoing it is clear that the attorneys (in the consolidated cases alone) have made a strong case to justify their requests for $1.75 million in fees. But we must read practical guidelines into *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), and when we do, the Court concludes that the requested allowances of counsel must be cut. We proceed to a discussion of the reasons.

For one thing, we have taken into account that the annual income of the Enquirer was only $2,049,161 for 1969 (after taxes) and $2,319,638 for fiscal 1970. The Enquirer's cash resources are roughly those of the downpayment or cash payment mentioned herein. We are not saying this is controlling, but it seems appropriate to take into account the fact that the Enquirer, while not a small corporation, was not a giant.

More importantly, while an economic benefit was conferred

by the attorneys' services, it was a "benefit" not wanted by most of those "benefitted." The vote to approve the purchase of the Scripps shares was overwhelming. But for the case being mooted, the proposal could have been resubmitted to the shareholders, and, if approved, there would not have been any economic benefit. We must conclude that most of the shareholders voted the way they did because they thought it was a gamble worth taking and because some wanted to keep the Enquirer locally owned and independent. It must be remembered that in 1952 a similar desire led employees and interested members of the community to raise enough money to purchase the majority interest in the Enquirer offered for sale by the McLean Estate. This turned out well for the shareholders, though they could not keep control because in order to finance the deal the purchasers had to give warrants, and it was these that the Scripps group purchased and thereby eventually acquired the majority interest in the Enquirer.

This time around it was management, as distinguished from the rank and file, which spearheaded the effort to keep the Enquirer independent and locally owned, but it was by having the Enquirer buy the shares of the majority interest.

However, it is to be noted that the transaction would have changed the Enquirer stock from "safe" to "risky" or "high leverage." And the Enquirer-Scripps deal was accurately described as "thin." As stated by one of the Enquirer directors, it was no deal for "widows or orphans."

Next, another thing that was taken into consideration was that while the applicants and their clients made no bones about the fact they believed the proposed purchase by the Enquirer of the Scripps shares was ill-advised, in their reply brief they make clear (page 4) that they do not claim that the various attorneys for the defendants are evil men and would do something they thought was wrong. They recognized the attorneys for the Enquirer as highly respected and they had similar regard for the Enquirer's accountants. But they did say that such attorneys and accountants made the mistake of looking on the proxy statement not as an unbiased presentation of all the relevant facts but as a

"selling tool" to persuade the common shareholders to vote for the proposals, and plaintiffs thought management was interested in perpetuating itself in power.

In fixing fees we have considered that while the plaintiffs may not have withdrawn claims that management of the Enquirer was trying to perpetuate itself in power (or at least some members of management) and were personally motivated, such claims could not be established. Nevertheless, it is probable that if the plan had been resubmitted and approved, management would have continued in the same hands, and in that event management would have been perpetuated in power without having to buy the Scripps shares themselves.

Speaking of motivation, we should not overlook the plaintiffs. I can only conclude that one (Mrs. Ramey) was motivated in part by old antagonisms. Mr. Harris thought some people might get hurt and "Jerry [Goldman] needed help." We did not require a statement from Mrs. Morelli, a widow who has a language difficulty and who was following the advice of her attorney-nephew.

In fixing the amount of the award now the Court must also take into account the fact that it should have been fixed sixteen months ago, and would have been but for the fact that the Enquirer's application to have Scripps pay part or all of the fee was delayed and much time was taken to try to get the matter settled.

As a result the Enquirer and AFC have had use of the money, and, in that connection, a representative of AFC testified that they expected to make 15% per annum from their capital. The money paid into a fund at the Court's direction when AFC offered to buy the minority shareholders has been on interest.

AFC bought the Enquirer aware of and without protecting itself by an indemnity agreement from having to pay this fee. AFC did not make an offer until this suit was over.

The Court has not considered that the applicants caused the AFC offer. On the contrary, some counsel tried to frustrate the Scripps-AFC offer.

The Court concludes that the fee request should be cut and fees in the *Enquirer* case should be in the amount of $865,000. Of

that amount $115,000 is included because in the Court's view the fee should have been fixed almost two years ago at $750,000, and $115,000 should be allowed because AFC and Enquirer have had use of that amount of money for this period, and their own representative testified that AFC would have made almost twice that amount on that amount of capital.

This is the total fee in all the cases. It remains to determine how this should be divided among the attorneys. This presents no problem in the three consolidated cases, because the Court is advised of the agreement among counsel "going in" that the fee, if any, would be divided equally among the three sets of lawyers. It is therefore only necessary to decide what proportion of the total fee, if any, should be awarded for services in the *Schoen* case.

III.

This determination of what share, if any, of the total fee should be awarded in the *Schoen* case is difficult. It required thorough analysis and requires complete candour.

The *Schoen* case was not consolidated with the other three, but, instead, was tried simultaneously with them. Counsel in the consolidated cases would not agree to any other arrangement for the stated reason that to do so would make for "too many cooks."

Lead counsel in the consolidated cases and counsel in the *Schoen* case were no strangers to each other. In fact, counsel in the *Schoen* case was formerly associated with Mr. Goldman and was his client in a 10(b)(5) derivative case filed in this Court one year prior to the *Enquirer* cases (the *Ohio Casualty* case). In that Mr. Mesh shared with Mr. Goldman a percentage of Mr. Goldman's one-third of the $600,000 fee approved by the Court, though Mr. Mesh did not participate in the preparation for trial which resulted in the settlement of the case. I think it is fair to assume that Mr. Mesh's experience in this type of case began with the *Ohio Casualty* case, although Mr. Mesh was also associated with Mr. Goldman and took some depositions for him in the case of *Elder-Beerman* v. *Federated Department Stores,* No. , United States District Court for the Southern District of Ohio, Western Division, at Dayton.

From this and what has happened since it is clear that Mr. Mesh is rapidly gaining experience in the field of stockholder derivative and other commercial cases. Also it is clear that he is willing and able financially to take the risks inherent in such representation and dedicated along that line. But for some reasor it is not possible for him and Mr. Goldman to pull in the same harness. We conclude that Mr. Mesh's interest and experience was known to other lawyers even then, accounting for the referral of the *Schoen* case to Mr. Mesh by Mr. Al Mechley, who will share in the fee, if one is allowed.

It seems in order to first inquire whether the *Schoen* case should have been filed. I cannot conclude that it should not have been filed. It is clear that it would have been filed before it was if the referral had come before it did.

The *Morelli* and *Harris* cases were "look alikes" to the *Ramey* case. *Schoen* was different. Counsel in the *Schoen* case evidently consulted experts to see what, if anything, had been overlooked in the first three cases and concentrated his attack on such overlooked issues and the request that the *Schoen* case be designated as a class action (which it never was).

In any event, the *Schoen* case was tried simultaneously with the others, submitted, and, while under submission, became mooted like the others when the Scripps group exited via the litigation clause in their contract with the Enquirer. The Court rendered its tentative decision and counsel in the *Schoen* case made several claims as to his part in bringing about this favorable result.

Before proceeding to an examination of such claims we note agreement with the contention of the defendants that counsel in the *Schoen* case should only share in the total attorneys fee if he helped bring about the favorable result. In the exercise of the discretion to which applications such as this are addressed, the Court must be alert to distinguish between legitimate corporate derivative actions and strike suits, and to discourage the latter. The standing of the legal profession and the integrity of the courts requires no less. While the policy of the law is to encourage derivative suits in the interests of corporate "therapy," ex-

treme care must be taken in passing on applications for attorney fees in this type of case, and nothing allowed if a case is more a "strike" case than a legitimate derivative action. By the same token, if restraint in the filing of such action would have been more appropriate, it is in order to scale down claims for attorney fees otherwise allowable.

There is no suggestion by the defendants that the first three actions were not legitimate derivative actions, and, as shown by the testimony of their own experts, the defendants recognize entitlement by the attorneys in those cases to fees.* Earl Morris, for instance, recognized that the key to the question is the Court's decision and from that determined that the proxy statement was not right, the method of submission was not right, and, therefore, there was a therapeutic result. (However, in his view no fund was created and no money benefit would inure to the Enquirer or EWS.)

But as to *Schoen* the application of *Schoen's* counsel for attorney fees is not recognized by defendants as meritorious. In fact, it is opposed vigourously by all defendants and by the lead counsel in the consolidated cases as well.

Before considering what counsel in the *Schoen* case actually did, we reject the following claims on his part:

First, that he is entitled to points because he is the only one who requested that his case be designated as a class action;

Second, that counsel in *Schoen* alone caused a rise in the market value of Enquirer stock from $23 to $35 and thereby conferred an economic benefit on the corporation and its shareholders by killing the Enquirer-Scripps deal;

Third, that it was due to counsel in the *Schoen* case that Scripps kept its options open, particularly for an offer that ran to the minority shareholders as well as the majority. In this connection we must conclude that as a result of the research of their own counsel, Scripps was well aware of every facet of the scope of the fiduciary duty of the Scripps group as majority shareholders;

*The fact that the case became moot does not affect the Court's power to award attorney fees. *Globus* v. *Jaroff*, 279 F. Supp. 807.

Fourth, that counsel in the *Schoen* case alone stopped the Enquirer from paying a premium bribe to Scripps.

The heart of Mr. Mesh's claim is that he was responsible for recognition of the Court that there were "special circumstances" and the deal was "high-leverage." As to high-leverage, we fail to see how this is any different from "thin" and "no deal for widows and orphans." As to the case being one of "special circumstances," this referred to the fact that the Enquirer was buying the Enquirer, a situation which, as noted herein, had a potential for abuse and was therefore one which required even more candour about the nature of the deal and its possible effects than contained in the exhaustive explanation to shareholders in the proxy statement.

We pass to a determination of whether counsel in the *Schoen* case did contribute to the successful result in all the cases—and, if so, how.

First, we note that counsel in the *Schoen* case was cooperative in limiting his participation in the trial to matters not covered in the consolidated cases. It is also a fact that he worked hard and long on the task of supplementing what the others did, and, with the help of experts in the field, screening the work of counsel in the consolidated cases to see what, if anything, was overlooked.

Necessarily Mr. Mesh's services were not on the main frontals of attack, *e.g.*, the debt-equity question, impairment of capital, and the claim that the proxy statement was misleading. He concentrated on such things as the claim that Scripps violated its fiduciary duty as a majority shareholder by accepting an offer for its stock which did not run to the minority shareholders (and in other ways). In that connection it must be remembered that Scripps had been in court for many years, was under an order of divestiture, and must have been anxious to get the litigation behind them. Also, the Court found in its decision there was no breach by the Scripps group of their fiduciary duty to minority shareholders and no premium bribe.

It did not seem at the time of trial that counsel in the *Schoen* case was that much help on the main issues in the case. Furthermore, it complicated matters to have a fourth case and a lot of

time logged by the attorneys in the consolidated cases who were working on the main issues was in waiting around while the novel issues were being litigated.

Nevertheless and notwithstanding, the Court concludes that counsel in the *Schoen* case should share in the total fee with the attorneys in the consolidated cases. We must conclude that he would have helped on the main issues if he had had a chance to, and he did the only thing he could and that was concentrate on the peripheral issues, and on these he worked long and hard in a back-up role to see if anything was missed. We cannot conclude that this was any less of a contribution than that made by those in a supporting role in the consolidated cases.

As this suggests, if counsel in the consolidated cases had not agreed among themselves upon the distribution of the fees, and it had been left up to the Court, we would have awarded more than one-third to Mr. Goldman.

For one thing, the fact that Mr. Mesh kept plugging continually in the *Schoen* case that the majority shareholders were civilly liable if they accepted an offer for their stock which did not run to all shareholders at least was a constant reminder to the Scripps group of their exposure, though plaintiffs' chances on that point were appraised as slim.

The Court concludes that for his contribution counsel in the *Schoen* case should get 10% of the fee allowed.

We have not overlooked that on cross-examination the expert on behalf of Mr. Mesh testified that Mesh would be entitled to nothing if unsuccessful in his contention that no premium bribe was paid as contended by him, etc. Neither have we overlooked that Mesh did not know how much of his total time was taken in the pursuit of such matters.

IV.
ALLOCATION–AND PENDENT JURISDICTION

That brings us to allocation and pendent jurisdiction. Allocation is a lawsuit in itself.

The Court concludes this is a proper case for allocation, but hastens to point out this is not because of any bad faith or the

participation of the Scripps group in the preparation of the proxy statement and agreements. They did indeed participate, and their suggestions—eventually, at least—were welcomed by the Enquirer. There was no bad faith on their part, and the Court so found. Nevertheless, the Scripps group occupied a fiduciary position. They came out real well and the time it took for this litigation worked to their great advantage in that a better offer came along—one for $5 more per share and which took them off the hook as far as exposure to claims that they were civilly liable if they accepted any offer which did not run to the minority shareholders. Much more could be said, but that should suffice to show why the Court concludes this is a proper case for allocation. We therefore conclude that the Scripps group should pay (toward fees and expenses) at the rate of 65¢ a share, for a total of $326,232.40 for their 501,896 shares. We also conclude the former shareholders who were paid in cash were benefitted and should contribute at the rate of 50¢ per share. There were 26,843 such shares, so this is a total of $13,420.50.

On behalf of the shareholders who converted to AFC securities, the Court concludes that they should also pay 50¢ per share toward the fees and expenses. There were 263,907¾ths such shares, so the total should be $131,953. The balance of the fees and expenses should be paid by the Enquirer.

Finally, the Court declines to accept pendent jurisdiction of the counterclaim of the Scripps group against the Enquirer in connection with fees. The reason for so doing was aptly put by one of counsel for the Enquirer, and that is simply "enough is enough."

Entry accordingly.

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United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JEAN WHITEHOUSE RAMEY vs. THE CINCINNATI ENQUIRER, INC., ET AL.,	Civil Actions No. 7704
ANGIOLINA MORELLI vs. THE CINCINNATI ENQUIRER, INC., ET AL.,	No. 7707
ALBERT HARRIS vs. RICHARD D. ALDER, ET AL.,	No. 7720
CECIL F. SCHOEN, a/k/a CECILE F. SCHOEN, vs. THE CINCINNATI ENQUIRER, INC., ET AL.,	No. 7734

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on Friday, February 12, 1971, at 3:00 p.m., the above-styled action came on for conference before the Honorable David S. Porter, Judge of the United States District Court for the Southern District of Ohio.

APPEARANCES:

On behalf of Plaintiff Jean W. Ramey:
Jerome Goldman, Esq.,
Douglas G. Cole, Esq.,
of
Goldman, Cole & Putnick

On behalf of Plaintiff Angiolina Morelli:
Arnold Morelli, Esq.,
Charles G. Heyd, Esq.,
of
Bauer, Morelli & Heyd

On behalf of Plaintiff Albert Harris:
Abraham Pomerantz, Esq.,
of
Pomerantz, Levy, Haudek & Block
and
Irving Harris, Esq.,
of
Cors, Hair & Hartsock

On behalf of Plaintiff Cecil F. Schoen:
Gene I. Mesh, Esq.,
Joel S. Moskowitz, Esq.,
of
Mesh & Moskowitz

On behalf of The Cincinnati Enquirer, Inc., and Enquirer Enterprises, Inc.:
Dennis J. Barron, Esq.,
of
Frost & Jacobs

On behalf of the Defendant Board of Directors of The Cincinnati Enquirer, Inc.:
John A. Lloyd, Jr., Esq.
of
Frost & Jacobs

On behalf of the Defendant Scripps-Howard Group:
Richard F. Stevens, Esq.,
of

Baker, Hostetler & Patterson
and
James W. Hengelbrok, Esq.,
of
Gorman, Davis, Hengelbrok & Price

THE COURT: Gentlemen, we are here to try to do good. Unless this is carefully conducted, and I am sure you all appreciate that, it may do more harm than good.

The first order of business I think is to consider, and if you approve of it, sign a protective order to the effect that nothing that is said here will be disclosed and no one participating in this permit themselves to be interviewed and there are to be no disclosure unless on written permission of the Court with notice to opposing counsel; that if disclosure has to be made to any party or representative of the party, that person should be first subjected to the protective order.

MR. GOLDMAN: Would this prohibit disclosure to my partner or to, say, Mr. Harris or Mr. Morelli?

THE COURT: Actually, I thought they were going to be here.

MR. GOLDMAN: They would love to be present, Judge. May they come up? They would love to be present.

THE COURT: Yes, I do not have any objection to that.

MR. STEVENS: Yes, Jim Hengelbrok, also.

MR. LLOYD: Mr. Hobson also. He went back across the street.

THE COURT: You can see why I asked for spokesmen. I just cannot manage something on the proportions of fifteen or sixteen lawyers.

MR. GOLDMAN: Can they just be silent sitters?

THE COURT: Yes.

Take a look at that and see what you think.

MR. BARRON: Mr. Goldman raised the question about partners, and we have the same problem even more so as far as other members of our firm.

THE COURT: Surely, you have to talk about it among yourselves to give advice.

MR. STEVENS: I really have to tell Mr. Dye and Mr. Madsen. I don't know it would have to go beyond that.

MR. LLOYD: We obviously have to tell Mr. Dale.

THE COURT: You agree with that?

MR. BARRON: I think we would have to tell Mr. Hobson.

MR. GOLDMAN: I think I would require any of my partners to sign the agreement that they are bound by it.

MR. BARRON: We will do that or tell them. I think we would have to tell Mr. Hobson, who is a party, and—

THE COURT: He is also a member of the firm.

MR. BARRON: Yes.

THE COURT: I would consider your signature would bind any member of your firm. You make the disclosure in view of that.

MR. BARRON: I think the only other person we would be concerned about is whether it would include Mr. Dale, whether we would be free to disclose to him because he is the president and client.

MR. STEVENS: Mr. Howard and Mr. Scripps, actually both of them probably, but I am sure they could be subjected to the order.

THE COURT: We have mechanics there as to how to subject them to the order. If you just want to get something in writing from them that they, pursuant to the Court's order, that they subject themselves.

MR. STEVENS: Well, I would undertake on behalf of Mr. Howard and Mr. Scripps—I take it it is not necessary as to any of my partners—to obtain a stipulation from them subjecting themselves to the order which would be presently signed.

THE COURT: Yes. Offhand, I do not see any need for any of the plaintiffs—

MR. GOLDMAN: I do not think they need to know.

THE COURT: —to get the information.

MR. GOLDMAN: I will not disclose it to Mrs. Ramey.

MR. MESH: Nor will I to Mrs. Schoen.

(Thereupon, Messrs. Hengelbrok, Cole, Harris, Morelli, Heyd and Moskowitz entered the room.)

THE COURT: This covers these gentlemen. I did not mean any offense in excluding you. In fact, I did not mean to exclude you. I just meant by advising spokesmen were to be selected that there be spokesmen selected so we could keep this within manageable limits.

The first order of business has been the consideration of a protective order, the substance of which is all parties in this conference agree and they are ordered not to disclose to anyone except

their partners what is said by anyone, including the Court here, and they not permit themselves to be interviewed.

We are here to try to do good; and, if we do not watch our step, we are going to do more harm than good. That is the reason for this precautionary step. Maybe I ought to sign it, too, as a participant and a judge.

(Laughter.)

MR. LLOYD: Your Honor, we understand under the order we will be free to disclose the happenings here to our partners in the firm?

THE COURT: Yes.

MR. LLOYD: And to Mr. Hobson and Mr. Dale.

THE COURT: But your signature to this subjects them to this.

MR. LLOYD: All of these people, it subjects them.

THE COURT: Your problem on mechanics is the same as Mr. Stevens, as far as Mr. Dale is concerned. Even though he is of counsel in your firm, unless it is agreed that your signature will bind him, also, in view of the fact that he is of counsel as well as president and publisher.

MR. LLOYD: I think we could do that.

THE COURT: What do you think?

MR. LLOYD: I feel we can.

THE COURT: Is there any objection?

MR. GOLDMAN: There is none.

MR. POMERANTZ: No.

(Thereupon, all counsel as listed on the appearance page signed the protective order.)

MR. GOLDMAN: Your Honor, shall Mr. Pomerantz make an oral motion?

THE COURT: As I understand it, you withdrew on the record?

MR. POMERANTZ: Well, that is substantially accurate. I have to say "substantially," because the fact of the matter is that, as I stated at the time, it was my wife's illness which brought me back to New York. But the fact is, also, that I did kind of—well, actively or certainly substantially contribute to the ensuing events.

I was in almost daily touch with counsel in Cincinnati, and I

won't take time to tell you the extent of my participation, so that I have never really regarded myself as being out of it, other than the day-to-day participation in the trial.

But let me, nonetheless, your Honor, in view of the area of doubt that is involved, and I confess there is some ambiguity about my status, make a formal application for leave to be readmitted to active participation in what remains of this lawsuit, which I take it is probably not very much and yet might be very critical.

In that connection may I make these just few brief remarks to indicate why I got back into the thing at all.

Last week one day Charles Keating telephoned to suggest to me that he had an offer to make. I am not going to tell you about the offer now, because I am aware of your admonition not to state anything that might embarrass the situation, except to say it was a proposal, a proposal which I felt would moot the issue in this case if acceptable all around.

I called the Department of Justice and spoke to Mr. Pearson and to Mr. Poole and narrated what I understood to be this proposal to them. Then as a consequence of that, I found myself in touch with Mr. Stevens, having learned there had meanwhile been another proposal about which you are aware, the Blue Chip proposal.

MR. LLOYD: Your Honor, may I object for the record to Mr. Pomerantz's re-instatement and to the proceeding at the present time wherein he is making this statement preliminary to what your Honor has said—

THE COURT: Do you object to him being re-admitted to the case in view of the development?

MR. BARRON: Yes, I do.

MR. POMERANTZ: Under the circumstances, may I be permitted to continue my application in usual fashion, reserving your right to object until after I have made my affirmative presentation, which I will try to do very briefly?

It would seem to me the time to oppose an application is after it has been made, not during its process, if it be made.

THE COURT: Well, it might suffice to just, without disclosing

anything—I do not know what prejudice could result; but, if there is any doubt about it, without disclosing who called or what was said or anything of that nature, you did get back in the case?

MR. POMERANTZ: Yes. And just to bring it up to date in three or four more sentences, I must confess in all fairness that I am responding and I am doing two things at once.

Now I am telling you why I am back in the case, and I am also answering some rather intemperate and I think rather uncalled for observation about my reappearance in the case by the gentleman who just interrupted my remarks, so let me say, your Honor, with a minimum of detail, let me point out why I am here, which I will do; two things to point out.

I am not kind of jumping back on the bandwagon at the eleventh hour on the one side and then on the other side at the meeting which I suggested, which was a meeting I suggested in all good faith and without the overtone from innuendos that have been surrounding it and the names that have been called in connection with it.

After I spoke to Mr. Stevens and learned from him what the situation was and with his consent on it and after I spoke to the Department of Justice and after I spoke to Mr. Goldman and Mr. Morelli and after I spoke to everybody in this situation, except for The Cincinnati Enquirer—and I will come back to that in a moment—I then called your Honor to suggest that I felt we had a situation here where this litigation was terminated. This was the thrust of my remarks to your Honor.

Now, I must confess that at that time I had no idea in the world that there would be any conceivable objection on the part of The Cincinnati Enquirer, and that is why I did not call Frost and Jacobs.

I might add to that that the basis for my feeling was it was perfectly clear to me, so I thought—I could be wrong—that the client of Mr. Stevens had every contractual right to terminate the arrangement, which in fact is what he did formally in the letter which went out, I am told, yesterday I think it was or today.

So that then when the matter was suggested, and pursuant to

your Honor's request, we called everybody, including Mr. Lloyd.

THE COURT: Excuse me. You should in fairness put on the record when you called me you said you were calling with the approval of Mr. Stevens, Mr. Goldman, Mr. Morelli and everybody. And I had every right to assume that "and everybody" includes Frost and Jacobs, and that is why I talked to you.

MR. POMERANTZ: If your Honor says that is what I said, I have no doubt of it.

THE COURT: Well, we made notes of it. I am not saying you intended to mislead the Court, but that was the result. And frankly, I have been embarrassed by the situation.

MR. POMERANTZ: Let me say to your Honor, if I said "everybody," then I certainly said "everybody" as far as my thinking at the time was concerned. It was everybody who was interested in the resolution of the controversy, because I had no means of knowing that The Cincinnati Enquirer had taken any position back in New York. The corporation in these cases, your Honor, as you know, in every derivative action are generally people for whose behalf the action is prosecuted by the plaintiff stockholders.

THE COURT: My experience in this area is limited, but it just seems to me wide the mark where the corporation is the purchaser. I could not see how there could be peace. What you suggested was maybe there was peace and a meeting would help promote that. I could not possibly see how there could be peace in this situation unless The Enquirer was in on it.

MR. POMERANTZ: Well, my answer to that, as I conceived it at the time and I might add as I still conceive it, your Honor, is that whenever Mr. Stevens' client said, "We are terminating this deal," that's the end of this litigation. I am not going to debate that. He may be open to a lawsuit by The Cincinnati Enquirer for having breached his contract, and that is between one side and the other. But your Honor, the way I view this matter, we are seeking to enjoin a contract.

MR. BARRON: Your Honor, we simply made an objection for the record.

THE COURT: I think this is getting way afield.

MR. POMERANTZ: May I just respond to that?

MR. STEVENS: If I may interrupt, your Honor, this is doing exactly what I think your Honor decided would not be done. He is speaking to the subject of mootness, and I believe it has nothing to do with whether he should be admitted or not admitted to appear in this case.

MR. POMERANTZ: I am not going to address myself beyond saying because I have been 46 years as a lawyer, and I have been attacked for unethical conduct, and all I am now submitting to your Honor is, if I have been wrong, it has been a failure to communicate. There couldn't have been anything improper intended because, if there were, would I misrepresent Mr. Lloyd and then invite him to the ceremony for the purpose of having him expose my misrepresentation? I would be all kinds of a fool to debate that.

Now, I am not going to debate mootness with you. I am going to say, (A), I ought to be re-admitted to active participation in the case; but, (B), should that application be denied, if what I have done in that situation should be ethically improper, I think my application should not be seriously entertained. I submit, however, I have done nothing improper. At worse, it is a failure to communicate.

I felt then and I feel now that what I said was correct; that on the basis of these developing facts, this litigation was finished. That was the purpose of the meeting which I suggested we call.

Now, I am done with my remarks. I am not arguing mootness.

THE COURT: I want to show on the record you did apologize to the Court in a subsequent phone conversation.

MR. POMERANTZ: I did, sir.

THE COURT: Not by way of admitting that you did anything wrong, but I think you certainly recognized that the Court was misled and maybe you didn't intend to mislead the Court, but I was sure as heck misled.

MR. POMERANTZ: I recognize that.

THE COURT: I want you to know that he apologized. I know the letter was strongly worded, and I am sure the sentiments were strongly felt; but there were some assumptions in there—I

mean, you recognized that your assumptions might not be correct, and that is the reason I wanted it on the record about the apology and why I talked to him in the first place.

I would not have talked to him, unless I made a mistake which I do very easily, unless I thought it had, as he said, the approval of quote "everybody."

MR. LLOYD: We understand that, your Honor, no problem.

THE COURT: I am in enough trouble.

MR. STEVENS: I think the Court, if the Court please, I should add in the one conversation I had with Mr. Pomerantz that I have no recollection of agreeing to his calling a meeting or indicating in any way that there was agreement among the parties to the litigation to settlement.

I do recall he spoke to me, said he wanted to call the Court, asked if I objected. I said I did not.

I did tell him only shortly prior to his call, which was around noon on last Tuesday, that we had dictated over the phone the press release which Mr. Howard issued and that I thought prior to his talking with the Court it would be helpful if he had the information in that press release so that he would know specifically who the offerer was and what the terms were of the offer. Beyond that, I do not have any additional recollection.

MR. POMERANTZ: That is a perfectly accurate statement of our conversation.

THE COURT: Well, I am going to grant the motion. I do so because you have a good reputation in this court and in cases also that involved Frost and Jacobs—only you were on the same side that time.

I think Mr. Pomerantz played a role of leadership in getting a settlement in the Ohio Casualty case after two months of intensive discovery and a number of meetings and calls. I think everybody has participated in this case with honor.

I have to say in all frankness, as I indicated in my letter, that if you don't make peace among yourselves, I do not think you are going to be able to do the job in this case that you did in Ohio Casualty because I think The Enquirer attorneys are key attorneys in this and, if you are not getting along with them because

you have been calling each other names—

MR. GOLDMAN: I think we will get over this because they happen to be very good friends of mine, and I think they will get over this momentary time of temper.

THE COURT: As I understand it, the only thing you want to take up in the presence of the Court, at least, is this matter of what the decision is tentatively, considering the case is not moot. It may be moot at the moment. I consider it a distinct possibility that either on or after the appeal from yesterday's order in 5656 that Scripps may be ordered to re-instate the contract, and I can see how it might be helpful to counsel in deciding whether to urge the Government to appeal, whether to pursue further litigation which would make peace an impossibile achievement.

You might want to know how this case lines up with the trier of the facts. Am I right?

MR. BARRON: Yes, your Honor.

THE COURT: You do not want to do anything but that today?

MR. BARRON: That is correct, your Honor.

THE COURT: Hopefully, we will get beyond that and get to the peace table later, but I do not see how you can unless you know what the tentative decision of the Court is if the case is on appeal or after appeal not moot because Scripps is ordered to re-instate its contract with The Enquirer.

I sent the law clerks out in the hall to tell you other than that I did not want to discuss mootness because I did not think it was the time.

I want it distinctly understood that this is tentative, and I repeat for emphasis it is not for publication. It is a broad outline of what the Court concluded on the main and critical issues of the case. We are still working on it.

I reserve the right to change my mind on any conclusion or finding that I indicate now that I tend to hold.

My conclusion, the injunction against the acquisition by The Enquirer of its own shares owned by Scripps should be continued and made permanent unless within a reasonable time it is dissolved on motion and for good cause shown if two-thirds of The Enquirer shareholders qualified to vote approve the write-down

of the stated capital of preferred shares which the Court finds Prudential has agreed to purchase for $6 million.

As this implies, the Court has concluded that the shortcut proposed by the three-cornered arrangement of having the shares issued to Scripps in exchange for 171,432 shares of Enquirer stock and simultaneously sold to Prudential for $6 million must be viewed by considering substance over form; and, when it is, we conclude that the shares were purchased and not exchanged.

I concluded that this three-cornered arrangement is impermissible in what I think of as the special circumstances of this case. By that I mean that this is a situation where a corporation is repurchasing its own shares in the hands of the majority and/or controlling shareholder, without making the same offer to minority shareholders and with no restriction being required by Ohio law against the use of capital created by such write-down in the stated value for the purpose of reacquiring its own shares.

Now, by mentioning the purchase and exchange issue first, I do not mean to imply that there may not have to be a resubmission to the shareholders on proposal number one if Scripps is ordered on or after appeal to re-instate its contract with The Enquirer. More about that later.

Next, The Enquirer prevails on the debt-equity issue. In other words, the Court has determined that the preferred shares are equity and not debt.

On the issue of whether or not the plan nevertheless violates the impairment of capital statute, the Court has concluded that it does not. "Impairment of capital statute" is a misnomer, for the statute expressly allows a corporation to purchase its own shares in certain instances, of which this is one, even out of capital. With two-thirds shareholder approval, Ohio allows any purchases from capital (or a lesser percentage down to a majority, if articles so provide). Such purchases are permitted from any type of surplus if two-thirds of the voting shareholders approve or if the articles of incorporation so permit, provided formalities are complied with.

Hence, we have concluded that almost any corporation may purchase any of its shares out of any type of surplus, no matter

how created. Specifically, we have concluded that "reduction surplus," the result of a write-down of stated capital, would be available for share purchases and the Ohio statute is generous in allowing a reduction of "stated capital" in any case by a two-thirds vote of the affected shareholders.

Surplus thus created is expressly made "capital surplus" (under Section 64 of the Model Act) and hence is available for share repurchase, and I assume the same is true in Ohio.

Next, The Enquirer articles of incorporation do not, in their present form, authorize the corporation to repurchase its shares without the approval of two-thirds of those qualified to vote on such proposal because, at the very least, the proposed plan "could" "impair capital" as that phrase is used in the articles. That phrase is not used in 1701.35.

In other words, "impairment of capital," as used in the articles does not mean that by use of diverted capital The Enquirer "could" comply with the law by writing down the stated capital of its common and the preferred shares.

1701.35, although it was apparently intended to protect shareholders as well as creditors, affords minimal protection against repurchase with shareholder approval of its own shares out of any capital, including capital created by write-down of stated capital.

Next, now, that brings us to the 10(B)5 question. I might deviate from the script a little to say I was impressed with the credibility of the authors of the proxy statement and in general the completeness and fairness of the presentation of the plan and effects of the plan. But here again, I think the special circumstances, as I referred to before, enter the picture and have the effect of requiring or holding that there are certain material omissions and maybe one or more misleading statements.

This may not be the correct way to put it, but the way it occurred to me when I was dictating these notes was on the 10(B)5 question the Court would find on resubmission of the plan to the shareholders for approval several things should be done. For one, I note and I do not have the page. I know you know the one I am referring to in the proxy statement because it is explanatory of

the effect of the plan on shareholders' equity. It just seemed to me there should be a statement such as the one in the earlier draft of the proxy statement to the effect that the approval of the plan would cause the elimination, at least temporarily, of the common shareholders' equity.

Next, it seemed to the Court in the president's letter or in the outset of the proxy statement there should be a disclosure (required by fiduciary duty) that there is a conflict between the interests of management and some of the directors in retaining local control of The Enquirer under the present management, and their duty to see that the minority fare as well as possibly financially under the divestiture order. My tentative conclusion along this line, or another tentative conclusion along this line, is that there should be a statement in any resubmitted proxy statement to the effect that the adoption of the plan would change the stock from "safe" to "risky," or at least that the plan is "high leverage" or "risky."

It remains to be decided whether or not, as contended by the plaintiffs, the Directors should be required to make a recommendation to the shareholders as to whether or not the plan is fair and equitable.

It remains to be decided whether the proxy statement is misleading in any other respect or whether or not there are any other material omissions.

I will vary from the script here to say a lot of the subparagraphs in paragraph 20 of the Ramey complaint were directed to the accounting treatment in the proxy statement throughout the trial, maybe understandably there were charges of bad faith. I felt that the statement in the plaintiffs' reply brief was such that all those charges have to be reviewed in the light of that statement, "that these men who worked on this were honorable men."

They may not have overlooked some opportunities to make the statement look good. There was no pattern of intent to defraud or anything of that nature which emerged to this trier of the facts as a result of the testimony, quite the contrary.

In general, I would not find any of those misleading in a 10(B)5

or 14A9 sense; though, it did seem to the Court that some opportunities were not overlooked to make the statement look good. That is not as strong a statement as the plaintiffs' that it was turned into a selling document, but it just seemed to me in the context of what I have referred to as the special circumstances in this case that complete candor was required, which is very hard to achieve I realize.

I am not changing the rules. I am thinking of it in what is material in the way of omission or what might be misleading in the way of something that was presented. In other words, I see that these special circumstances very much enter the picture in the Court's determination what is a material omission in this proxy statement.

It remains to be decided whether or not in the proxy statement there should be a statement that the dividend policy may be jeopardized, even though there is a regulation against prediction. I am not sure this would prevent a gloomy prediction; and I am not sure, in all frankness, if the matter is resubmitted it should not be said that the risk is involved. It may be proper in that connection to say management thinks the risk is one that is worth taking.

I would have to say it remains to be decided whether any other changes should be made. In other words, whether there are any material omissions in view of the Court's conclusion that the special circumstances in this case are what they are. This is not the ordinary situation, but one with problems which are peculiar because the purchase is by a corporation of its own shares and because the problem is acute because the shares being acquired are the controlling shares.

I find no evidence of conspiracy or breach of fiduciary duty on the part of the Directors or breach of fiduciary duty on the part of the majority shareholder to the minority shareholders. However, this does not foreclose reexamination of the contention that the majority shareholder breached a fiduciary duty to the minority shareholders if the case is reopened to include evidence that, after the close of the trial of the case, an offer was received which constituted an "alternate" to the offer of The Enquirer. I

find no alternate existed prior to that.

I find no causation between the plan and the drop in the market.

I conclude there is no legal requirement on the part of The Enquirer to make the same offer to the other shareholders.

I find that the $35 figure was a fair value and no premium was paid.

I would overrule without considering the motion for a motion for directed verdict in favor of the outside Directors because that matter is before the Court on the merits, and I would proceed to find in favor of said defendants.

The Court finds The Enquirer has power to acquire the Scripps' shares, but there must be no question on resubmission about the propriety of the exercise of such power.

As I have indicated, all that remains to be done is put this decision in the form which the law requires; and I said in the letter that takes time. If in the process I change my mind on any of these things, I reserve the right to do so.

It would be a mistake to construe what I have done here as an invitation to further argument or to think that this is opened up to questions as to why I did this or why I did it. Those are my tentative conclusions. They are revealed in the hope that the disclosure will be helpful.

MR. POMERANTZ: It will be.

MR. STEVENS: Thank you, your Honor.

MR. LLOYD: I wonder, before we break, if I might hear again the first paragraph?

THE COURT: You may get a transcript.

MR. LLOYD: I wasn't aware of that.

(Thereupon, the conference came to a close.)

CERTIFICATE

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION
Cincinnati, Ohio

This is to certify that the foregoing transcript of proceedings in the matter of

JEAN WHITEHOUSE RAMEY vs. THE CINCINNATI ENQUIRER, INC., ET AL.,	Civil Actions No. 7704
ANGIOLINA MORELLI vs. THE CINCINNATI ENQUIRER, INC., ET AL.,	No. 7707
ALBERT HARRIS vs. RICHARD D. ALDER, ET AL.,	No. 7720

CECIL F. SCHOEN, A/K/A CECILE F. SCHOEN,

vs.

THE CINCINNATI ENQUIRER, INC., ET AL.,

No. 7734

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on the 12th day of February, 1971, before the Honorable David S. Porter, Judge of the United States District Court for the Southern District of Ohio, is a true and correct transcript thereof.

Lysbet P. Hoffman
Official Court Reporter